Supreme Court, U.S.
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No. _____

In The

# Supreme Court of the United States

COMPRO-TAX, INC; JACKIE E. MAYFIELD; YUSUF A. MUHAMMAD; INGA RHODES,

*Petitioners,*

v.

INTERNAL REVENUE SERVICE; THELMA DENNIS; UNITED STATES OF AMERICA,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

STUART M. NELKIN
NELKIN & NELKIN, P.C.
5417 Chaucer
Houston, TX 77005
(713) 526-4500
*Counsel of Record*

JAY P. NELKIN
NELKIN & NELKIN, P.C.
5417 Chaucer
Houston, TX 77005
(713) 526-4500
*Counsel for Petitioner*

CAROL NELKIN
NELKIN & NELKIN, P.C.
5417 Chaucer
Houston, TX 77005
(713) 526-4500
*Counsel for Petitioner*

February 6, 2002

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127 pp

## QUESTIONS PRESENTED

1. Does the doctrine of sovereign immunity bar a suit against the Government for injunctive and declaratory relief?

2. Does the Privacy Act require an allegation of "willfulness" in order to state a claim under that Act?

3. Does IRS's revocation of Petitioners' authorization to file electronic tax returns on behalf of their clients based upon the retroactive application of a 1996 Revenue Procedure to conduct occurring in 1994 and 1995 violate due process of law?

4. Does a federal agency's affirmance on administrative appeal of an adverse action taken against a grievant violate due process of law where the agency's decision to affirm is based upon charges and materials added to the administrative file without giving notice to the grievant or the opportunity to be heard?

5. Does a federal agency's affirmance on administrative appeal of an adverse action taken against a grievant violate the Privacy Act where the agency's decision to affirm is based upon charges and materials added to the administrative file without giving notice to the grievant or the opportunity to be heard?

6. Was denial of class certification under the circumstances of this case an abuse of discretion?

## LIST OF PARTIES

The parties to the proceedings below were the petitioners, Compro-Tax, Inc., Jackie E. Mayfield, Yusef A. Mohammad, and Inga Rhodes and the respondents, Internal Revenue Service, Thelma Dennis, and the United States of America.

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## OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is not published. App. 1. The District Court's Memorandum and Order dismissing this civil action is not published. App. 2. The District Court's Order adopting the Magistrate Judge's Memorandum and Recommendation is not published. App. 28. The Magistrate Judge's Memorandum and Recommendation recommending partial dismissal of this civil action is not published. App. 29. The District Court's Order Denying Class Certification is unpublished. App. 25.

## JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered its judgment on September 7, 2001. App. 1. The Court of Appeals denied Petitioners' Petition for Rehearing and Suggestion for Rehearing En Banc on November 9, 2001. App. 61. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

## LEGAL PROVISIONS INVOLVED

U.S. Const. Amend. I provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. Amend. V provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

5 U.S.C. § 552a(g) provides:

> (g)(1) Civil remedies. Whenever any agency
>
> (A) makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection;
>
> (B) refuses to comply with an individual request under subsection (d)(1) of this section;
>
> (C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or
>
> (D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual, the individual may bring a civil action against the agency, and the district courts of the United States shall have

jurisdiction in the matters under the provisions of this subsection.

(2)(A) In any suit brought under the provisions of subsection (g)(1)(A) of this section, the court may order the agency to amend the individual's record in accordance with his request or in such other way as the court may direct. In such a case the court shall determine the matter de novo.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(3)(A) In any suit brought under the provisions of subsection (g)(1)(B) of this section, the court may enjoin the agency from withholding the records and order the production to the complainant of any agency records improperly withheld from him. In such a case the court shall determine the matter de novo, and may examine the contents of any agency records in camera to determine whether the records or any portion thereof may be withheld under any of the exemptions set forth in subsection (k) of this section, and the burden is on the agency to sustain its action.

(B) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this paragraph in which the complainant has substantially prevailed.

(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of –

(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of $1,000; and

(B) the costs of the action together with reasonable attorney fees as determined by the court.

(5) An action to enforce any liability created under this section may be brought in the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, without regard to the amount in controversy, within two years from the date on which the cause of action arises, except that where an agency has materially and willfully misrepresented any information required under this section to be disclosed to an individual and the information so misrepresented is material to establishment of the liability of the agency to the individual under this section, the action may be brought at any time within two years after discovery by the individual of the misrepresentation. Nothing in this section shall be construed to authorize any civil action by reason of any injury sustained as the result of a disclosure of a record prior to September 27, 1975.

5 U.S.C. §§ 701-706 appears at App. 63.

Rev. Proc. 96-61 is reported at 1996 WL 745137 (I.R.S.). It appears at App. 68.

Rev. Proc. 95-49 is reported at 1995 WL 724153 (I.R.S.). It appears at App. 76.

Rev. Proc. 94-63 is reported at 1994 WL 509859 (I.R.S.). It appears at App. 84.

## STATEMENT OF THE CASE

Petitioners Compro-Tax, Inc., Mayfield, Muhammad and Rhodes sued Respondents, Internal Revenue Service, Dennis, and the United States for violations of the first and fifth amendments to the United States Constitution; the Privacy Act, 5 U.S.C. § 552a *et seq.*; the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706; and 26 U.S.C. §§ 6103 and 7431. Petitioners challenged the constitutionality of certain "suitability" and "association" rules promulgated by the IRS under its Electronic Filing Program and the application of those rules by IRS and Dennis to suspend the Electronic Filing Identification Numbers ("EFINs") of Mayfield, Muhammad, and Rhodes, who are each in the tax return preparation business, and to suspend or threaten to suspend the EFINs of other tax return preparers who were in any way associated with Compro-Tax.[1] Petitioners also sought review of their suspensions under the APA and to purge the suspensions and other false and irrelevant information from their records under the Privacy Act.

Compro-Tax, Inc., which is owned by Mayfield and Mohammad, is engaged in the tax preparation business and provides a variety of tax related services to clients in Texas, Louisiana, and Kentucky. Compro-Tax offices exist in approximately 50 locales, and the income generated by

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[1] Throughout the United States at least 300 to 700 EFIN holders are suspended each year under the "suitability" rules, and it is likely that the total number exceeds a thousand. It is estimated that an equal number of persons have had their EFINs suspended or have been threatened with suspension under the "association" rules.

Compro-Tax, its associates, and related parties is substantial. Compro-Tax utilizes a structure analogous to multi-level marketing. Rather than employ tax return preparers and supervisory staff, Compro-Tax trains individuals and establishes brokerages that are ultimately owned and supported by these individuals. Each brokerage is an independent business operating under the Compro-Tax umbrella. Approximately three hundred trained tax return preparers work through Compro-Tax brokerages as "associates."

Compro-Tax itself does not possess an EFIN and does not prepare or file any tax returns on behalf of third parties. However, most of its associates do so, and these associates market themselves to the general public under the Compro-Tax name. Compro-Tax does not charge any fees for electronic filing nor does it share in any electronic filing fees charged by other tax return preparers.[2]

Under rules established by IRS, electronic filing can only be conducted by persons who have received an EFIN. Mayfield, Muhammad, Rhodes and most of Compro-Tax's three hundred associates each obtained EFINs through the process established by IRS.

In July 1997, without any prior notice or opportunity to be heard, Mayfield and Muhammad were each advised by letters from IRS that their respective EFINs were to be

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[2] Although no electronic filing fees are charged or shared, the fees paid to Compro-Tax brokerages by third party clients for whom the Compro-Tax brokerages perform services are shared with Compro-Tax. Compro-Tax receives twenty percent (20%) of the fees generated, and the brokerages receive eighty percent (80%) of the fees generated.

suspended for a period of two and a half years.[3] App. 48, 55. The sole reason given for these summary suspensions was that Mayfield and Muhammad had filed their calendar year 1995 federal tax returns late. IRS contended that by filing their 1995 tax returns late, Mayfield and Muhammad violated Rev. Proc. 96-61, an EFIN "suitability" rule calling for the "timely and accurate filing of tax returns." This Revenue Procedure, which included a specific reference to tax returns where no tax is due, was not adopted and published until December 30, 1996 and by its terms did not apply to 1995 tax returns. Rev. Proc. 96-61 §§ 2.08, 4.19(2).

Rev. Proc. 95-63, the applicable regulation governing Mayfield's and Muhammad's 1995 tax returns, differed in one critical respect from the inapplicable regulation cited by IRS in suspending Mayfield and Muhammad. It did not contain the explicit language contained in Rev. Proc. 96-61 specifying that the requirement to file timely and accurate tax returns included "returns indicating no tax is due." Prior to enactment of Rev. Proc. 96-61 which contained the added reference to "returns indicating no tax was due", IRS did not suspend the EFINs of individuals who failed to timely file returns where no tax was due. Individuals filing late returns for which no tax was due were repeatedly deemed suitable in annual IRS suitability reviews.

Although Mayfield and Muhammad failed to timely file their 1995 returns, their 1995 returns were accurate and demonstrated that no tax was due from either of them, and in fact each was entitled to a refund. Thus

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[3] While couched as a "proposed suspension" in the letter, the suspensions were effective immediately.

while their actions were in compliance with the applicable IRS regulation for 1995 returns, IRS nevertheless suspended Mayfield and Muhammad for failure to comply with Rev. Proc. 96-61 which expressly did not apply to 1995 tax returns and which became effective after it was impossible for Mayfield and Muhammad to comply with its provisions for the 1995 tax year. Rev. Proc. 96-61 §§ 2.08, 20.

After receiving notice of their suspensions, Mayfield and Muhammad contacted Dennis and requested that IRS correct Petitioners' records to accurately reflect that because they had complied with the applicable regulation governing their 1995 tax returns, they were in fact "suitable" for continued retention of the EFINs which had been issued to them some eight years previously and for which they had passed suitability reviews in each subsequent year. Dennis denied the relief requested.

Mayfield and Muhammad then prosecuted appeals to the United States Department of Treasury Office of Director of Practice. On January 27, 1998 that office denied Muhammad's appeal and on April 1, 1998, it denied Mayfield's appeal. App. 50, 43.

Respondents' suspension of Mayfield's and Muhammad's EFINs was a devastating blow both to their income and to their reputation. Nevertheless, Mayfield and Muhammad continued to serve in their respective leadership capacities with Compro-Tax until subsequent actions of IRS and Dennis made their ability to do so impossible. Immediately after the suspension notice letters were sent, IRS and Dennis began contacting persons associated with Compro-Tax and threatening those individuals with suspension from the Electronic Filing Program if they continued to be associated with Compro-Tax.

The "association" rules related to the Electronic Filing Program first appeared in Rev. Proc. 94-63, Section 4.12(11) and (12) and provided as follows:

> The following reasons may result in the rejection of an application to participate in the 1995 Electronic Filing Program (this list is not all-inclusive):
>
> * * *
>
> (11) knowingly and directly or indirectly employing or accepting assistance from any person who has been denied acceptance into the Electronic Filing Program or is suspended from the Electronic Filing Program. (This includes any individual whose actions resulted in the rejection or suspension of a corporation or a partnership from the Electronic Filing Program); or
>
> (12) knowingly and directly or indirectly accepting employment as an associate, correspondent, or as a sub-agent from, or sharing fees with, any person who has been denied acceptance into the Electronic Filing Program or is suspended from the Electronic Filing Program. (This includes any individual whose actions resulted in the rejection or suspension of a corporation or a partnership from the Electronic Filing Program.)

Thereafter, each year the "association" rules were carried forward with an annual enactment of a similar Revenue Procedure. *See, e.g.*, Rev. Proc. 96-61 § 4.19(11)-(12).

Compro-Tax is not covered by these "association" rules as it has never possessed an EFIN, does not engage in electronic filing, and has never been suspended from the Electronic Filing Program. Nevertheless, beginning in

July 1997 Respondents engaged in a concerted effort to prevent individuals from associating with Compro-Tax. For example, on March 27, 1998, Dennis and other IRS agents made an unscheduled visit to the Compro-Tax office where Mayfield conducted his individual tax return preparation business.[4] During this unscheduled visit, Dennis informed Rhodes, who is Mayfield's daughter, that if Rhodes did not immediately sever all connections with her father, including not working in a Compro-Tax office, Dennis would suspend Rhodes' EFIN. Thereafter, Dennis summarily suspended Rhodes' EFIN for a period of approximately two and a half years based upon the IRS "association rules" even though Rhodes was an independent tax preparer, was not employed by her father, and did not share fees with him. App. 59.

On April 14, 1998, the day before federal personal income tax returns were due, Dennis and other IRS agents made an unscheduled visit to the Compro-Tax office where Muhammad conducted his individual tax return preparation business. At that time Dennis threatened Muhammad's daughter, Mhoytia Muhammad, who is an independent tax preparer, with suspension of her EFIN if she continued to associate with her father or Compro-Tax in any manner whatsoever.

Thereafter, Dennis forwarded letters to Compro-Tax's tax return preparers and supervisors of the various Compro-Tax brokerages advising them that Mayfield and

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[4] Although suspended from the Electronic Filing Program, neither Mayfield nor Muhammad were prevented from preparing and filing tax returns manually. In fact, there has never been a finding or suggestion by IRS that either Mayfield or Muhammad is unqualified to act as a non-electronic filing tax return preparer.

Muhammad had been suspended and "warning" the recipients that they would likewise have their EFINs suspended if they did not within thirty days terminate any association with Mayfield, Muhammad and Compro-Tax. Fearing retribution by IRS as threatened by Dennis, a number of the recipients of Dennis' threats severed their relationships with Compro-Tax.

Following the institution of suit, Respondents filed a combined Motion to Dismiss for Lack of Subject Matter Jurisdiction and Motion for Summary Judgment which the District Court referred to a Magistrate Judge. Thereafter, the Magistrate Judge filed a Memorandum and Recommendation in which she concluded that (1) Petitioners could pursue their claims for injunctive and declaratory relief against IRS and the United States for violations of Petitioners' constitutional rights; (2) Petitioners' Privacy Act claims should be dismissed for failure to state a claim; and (3) Petitioners' claims under the APA could proceed. The District Court adopted these recommendations. Class certification was denied on September 13, 1999.

By separate Order the District Court granted Dennis' Motion to Dismiss and Motion for Summary Judgment, granted Respondents' Motion for Summary Judgment on Petitioners' APA claims and *sua sponte* dismissed the remainder of Petitioners' claims with the exception of their claims under 26 U.S.C. §§ 6103 and 7431. A final Order of Dismissal was entered on May 12, 2000. The United States Court of Appeals for the Fifth Circuit affirmed the District Court's dismissal of all of Petitioners' claims.

## REASONS FOR GRANTING THE WRIT

### I.

**The Fifth Circuit's affirmance of the District Court's dismissal of Petitioners' suit against the Government on sovereign immunity grounds conflicts with decisions of this Court which have consistently held that suits against the Government for declaratory and injunctive relief face no sovereign immunity bar.**

In their first, third, seventh, and eighth claims, Petitioners alleged that Respondents violated Petitioners' first and fifth amendment rights. As redress for the violation of their constitutional rights, Petitioners sought declaratory and injunctive relief.

The Fifth Circuit affirmed the District Court's erroneous holding that Petitioners were precluded from prosecuting these claims by the doctrine of sovereign immunity because Congress had not expressly waived sovereign immunity as to the IRS or the United States for constitutional violations. The Fifth Circuit's decision is contrary to longstanding Supreme Court precedent which establishes that Section 702 of the APA provides for judicial review of an agency action and waives sovereign immunity for claims seeking relief other than money damages. *Lane v. Pena*, 518 U.S. 187, 196 (1996). The APA specifically states that an action:

> . . . shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States.

5 U.S.C. § 702. This principle is confirmed by the precedents of this Court which establish that the APA has

waived the government's sovereign immunity in situations such as the one present here. *Lane v. Pena*, 518 U.S. at 196; *Bowen v. Massachusetts*, 487 U.S. 879, 891-92 (1988). Furthermore, by its terms, the APA extends to agency actions that are "contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706. In particular, the APA has been held applicable to the review of agency actions that impinge on fifth amendment rights similar to those asserted here by Petitioners. *Webster v. Doe*, 486 U.S. 596, 602-604 (1988).

In affirming the District Court's *sua sponte* dismissal of Petitioners' claims for declaratory and injunctive relief on sovereign immunity grounds, the Fifth Circuit not only departed from long-standing authority interpreting the APA but also ignored the line of authority which makes clear that the doctrine of sovereign immunity does not bar suits for injunctive or declaratory relief under 28 U.S.C. §§ 2201 and 2202. *Dugan v. Rank*, 372 U.S. 609 (1983).

## II.

**The Fifth Circuit's affirmance of the District Court's dismissal of Petitioners' Privacy Act claims for failure to allege intentional or willful violations constituted an unauthorized amendment of the Privacy Act section in issue.**

In affirming the District Court's opinion which adopted the Magistrate Judge's recommendations to dismiss Petitioners' Privacy Act claims, the Fifth Circuit, failed to perceive that Petitioners had brought their claims under 5 U.S.C. § 552a(g)(1)(A), (B), (C), and (D). In her recommendation, the Magistrate Judge first erroneously stated that Petitioners had brought their claims

only under 5 U.S.C. § 552a(g)(1)(C) and only pursuant to 5 U.S.C. § 552a(g)(4), and then recommended dismissal because Petitioners did not allege an intentional or willful action that resulted in inaccurate information being placed or maintained in Petitioners' records.[5] The Magistrate Judge also ignored the Privacy Act section applicable to Privacy Act damage claims. Section 552a(g)(1)(C) provides that an individual may bring a civil action against a federal agency whenever the agency:

> fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual.

5 U.S.C. § 552a(g)(1)(C).[6] An agency can also be held liable for violations under the Privacy Act under 5 U.S.C. § 552a(g)(1)(A) or (B) for, *inter alia*, failing to amend an

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[5] The Magistrate Judge's recommendation ignored the plain language of Petitioners' Complaints each of which alleged that Respondents' actions were "willful." Even if Petitioners had failed to allege that Respondents' actions were willful, this would not bar their Privacy Act claims since willfulness is not a prerequisite to maintenance of a Privacy Act claim, but rather a prerequisite for recovery of money damages under 5 U.S.C. § 552a(g)(1)(C) or (D). In the absence of willfulness a plaintiff may still recover attorney's fees and other relief for a Privacy Act violation. 5 U.S.C. § 552a(g)(3).

[6] Although not addressed by the Magistrate Judge, 5 U.S.C. § 552a(g)(1)(D), also pled by Petitioners, applies where an agency "fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual." 5 U.S.C. § 552a(g)(1)(D).

inaccurate record after being requested to do so. *Sellers v. Bureau of Prisons*, 959 F.2d 307, 366 (D.C. Cir. 1992). Petitioners have alleged that IRS failed to "maintain all records which are used by the agency in making any determination about any individual with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in the determination" and "prior to disseminating any record about an individual to any person other than an agency . . . [failed to] make reasonable efforts to assure that such records are accurate, complete, timely, and relevant for agency purposes." 5 U.S.C. § 552a(e)(5) and (6). Petitioners alleged, and should have been afforded the opportunity to prove that IRS maintains records concerning them which are inaccurate, irrelevant, and incomplete and has refused all requests to correct these records. Such records did not assure fairness to Petitioners in subsequent determinations by IRS which were adverse to them, and the agency disseminated inaccurate, irrelevant, and incomplete information about Petitioners to other persons, thereby violating the Privacy Act.

## III.

**The Fifth Circuit erroneously failed to recognize that the Government's invoking of disqualifying standards not in place at the time of Petitioners' allegedly offending conduct and the Government's reliance on appeal upon information added to Petitioners' administrative file without notice or the opportunity to be heard constitute violations of the Constitution, the APA, and the Privacy Act.**

The Fifth Circuit erroneously affirmed the dismissal of Petitioners' APA claims in violation of § 706 of the

APA. Section 706 of the APA sets forth the standards under which to review an agency decision and provides that the reviewing court shall:

> (2) hold unlawful and set aside agency action, findings, and conclusions found to be –
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> * * *

Petitioners alleged that the actions and decisions of IRS violated all four of the grounds delineated in § 706, however, the Fifth Circuit affirmed the District Court's opinion which focused solely on whether IRS's action was arbitrary, capricious, or an abuse of discretion. In both its affirmance of the District Court's dismissal of Petitioners' § 706(2)(A) claim and its failure to address Petitioners' assertions that Respondents' actions also violated § 706(2)(B)-(D) and § 706(2)(A), the Fifth Circuit erred.

The APA requires a "thorough, probing, in-depth review" which is "searching and careful" to determine if an agency's "decision was based on a consideration of relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415-16 (1971), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 89, 105 (1977). "[T]he court must examine the procedures employed by

the agency in reaching its decision to ensure that these procedures comply with applicable statutory and constitutional requirements." *United States Lines, Inc. v. Federal Maritime Comm'n*, 584 F.2d 519, 526 (D.C. Cir. 1978) (*citing Overton Park*, 401 U.S. at 417).

Courts are not permitted to look beyond the administrative record existing at the time of the decision. "[T]he focal point for judicial review should be the administrative record already in existence, *not some new record made initially in the reviewing court*." *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (emphasis added). "It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983). *Post hoc* explanations by the agency or its counsel are inadequate to support agency decisions. *United States Lines*, 584 F.2d at 532; *Johnson v. Office of Thrift Supervision*, 81 F.3d 195, 205 (D.C. Cir. 1996) (agency could not shift basis of its decision during judicial review). If an agency relies on data in its files, it must disclose that information to the adversary for his consideration and comment. *United States Lines*, 584 F.2d at 534-35. Under these standards, it is clear that Respondents violated the APA.

**1. Rhodes' Suspension.**

The Fifth Circuit affirmed the District Court's erroneous conclusion that Rhodes' suspension was appropriate in light of her relationship with her father in violation of the "association" rules because the District Court erroneously believed that Rhodes had admitted in an affidavit that she was employed by her father's office and corporation. The District Court misread Rhodes' affidavit as she did not admit to either of these two facts. Rhodes

stated that she was an "independent tax preparer" who had been trained by Compro-Tax.[7] Furthermore, while Rhodes indicated she and her father both utilized office space provided by Compro-Tax, she never indicated she was in an employment relationship with either Compro-Tax or her father. *Id.*

In their pleadings, Respondents represented that Rhodes was suspended for "sharing of electronic return preparation fees" or "sharing electronic filing income" with persons whose EFINs were suspended.

Respondents' proffered reason was not credible since it was uncontroverted that Rhodes did not share or charge fees for electronic filing.[8] Furthermore, a review of Compro-Tax's standard broker contract form demonstrates that there is no provision allowing for electronic filing fees to be charged or collected. Thus, there was no sharing of fees which Respondents contend justified Rhodes' suspension. Regardless of which implausible reason is asserted, it is clear that IRS and Dennis never considered any evidence on this matter but rather made improper and inaccurate assumptions in suspending Rhodes' EFIN. As Respondents' decision to suspend Rhodes' EFIN was based on erroneous assumptions, the inaccuracy of which could have been exposed by a simple inquiry by Dennis, Respondents' suspension of Rhodes' EFIN was "arbitrary, capricious, an abuse of discretion,

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[7] Affidavits of Mayfield and Muhammad also confirmed that Rhodes was an "independent tax preparer" who was not employed by them.

[8] Rhodes has never charged electronic filing fees. Mayfield and Muhammad stopped charging such fees after the 1997 tax season (1996 tax returns).

and otherwise not in accordance with law;" was "contrary to constitutional right, power, privilege, or immunity;" and was "without observance of procedure required by law." Furthermore, the affirmance of Rhodes' suspension on grounds different from those asserted by Respondents was improper. *Motor Vehicle Mfrs.*, 463 U.S. at 50.

**2. Mayfield's and Muhammad's Suspensions.**

The Fifth Circuit affirmed the District Court's holding that Respondents' actions toward Mayfield and Muhammad did not violate the APA. Yet the record reflects that Respondents have violated APA standards in the following ways:

(a) Respondents acted under regulations which did not even exist at the time of Mayfield's and Muhammad's conduct and which were materially changed since that conduct;

(b) Respondents ignored the plain language of the applicable regulations in order to suspend the EFINs of Mayfield and Muhammad;

(c) Respondents arbitrarily suspended Mayfield and Muhammad after an annual suitability check in 1997 for conduct which occurred in 1995 and which had passed the annual suitability checks in all previous years;

(d) Respondents did not give Mayfield and Muhammad notice of the conduct upon which they based their suspensions; and

(e) Respondents utilized additional, unmentioned conduct to affirm suspensions without giving Mayfield and Muhammad the

> opportunity to contest or even comment on those grounds.

It is undisputed that Respondents suspended Mayfield and Muhammad pursuant to Section 4.19(2) of Rev. Proc. 96-61. As noted above, this Revenue Procedure was enacted subsequent to the 1995 tax year and was not applicable to Petitioners' 1995 tax returns. This was a critical point because Rev. Proc. 96-61 § 4.19(2) provided for the first time as a reason for denial of participation in the Electronic Filing Program the "failure to file timely and accurate tax returns, *including returns indicating that no tax is due.*" Rev. Proc. 96-61 § 4.19(2) (emphasis added). During 1994 and 1995, the relevant Revenue Procedure did not contain the language addressing late filing of "returns indicating no tax was due." Rev. Proc. 95-49 § 4.14(2), Rev. Proc. 94-63 § 4.12(2). After citing its statutory authority, Rev. Proc. 96-61 states: "Participants in the 1997 Electronic Filing Program for the Form 1040 series are informed of their obligations to the Service, taxpayers, and other participants." Rev. Proc. 96-61. In the "Purposes" section (Sec. 1), Rev. Proc. 96-61 indicates that its function is to "update" Rev. Proc. 95-49 and in the "Background and Changes" section (Sec. 2) states that:

> This revenue procedure updates Rev. Proc. 95-49, which applied to the Electronic Filing Program for the 1996 filing season. The updates include changes in the Electronic Filing Program for the 1997 filing season, clarifications of prior Electronic Filing Program statements, and additional guidance from other Service documents that relate to the Electronic Filing Program.

Rev. Proc. 96-61 § 2.08. Although Respondents admit that the alleged misconduct of Petitioners occurred in 1996 and earlier, and that they utilized Rev. Proc. 96-61 to

suspend Mayfield and Muhammad, the Fifth Circuit was not troubled by this retroactive application of a Revenue Procedure that first became effective in 1997. The Fifth Circuit was wrong. Rules of statutory construction require an interpretation consistent with the view that there was a reason for the 1996 change to Section 4.19(2) which added the phrase "including returns indicating that no tax is due". *See BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537, 114 S.Ct. 1757 (1994) (holding that "it is generally presumed that Congress acts intentionally and purposefully when it includes particular language in one section of a statute but omits it in another"); *see also Reiter v. Sonotone Corp.*, 442 U.S. 330, 338-39 (1979) (noting that "[i]n construing a statute, we are obliged to give effect, if possible, to every word Congress used" and finding the "strained construction" proposed by the respondent "would have us ignore the disjunctive word 'or' . . . "); *Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F.3d 28, 31 (3d Cir. 1995) (explaining that "a basic tenet of statutory construction, equally applicable to regulatory construction, [is] that a statute 'should be construed so that effect is given to all its provisions, so that no part is inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error' "). Petitioners submit that the proper analysis of Mayfield's and Muhammad's conduct was under the "suitability" rules in effect during the 1995 and 1996 tax seasons. This is especially true where the December 30, 1996 change to Section 4.19(2) altered the rule subsequent to the conduct as to which IRS sought to make the rule applicable by adding language to include late filed tax returns where

no tax was due. It is a chilling concept that an agency can take action against a citizen for conduct in violation of rules which did not exist at the time of the conduct, as IRS did here. Such action is clearly "arbitrary, capricious, an abuse of discretion", and "otherwise not in accordance with law;" "contrary to constitutional right, power, privilege, or immunity;" and "without observance of procedure required by law;" all in violation of the APA.[9]

Yet another violation of the APA not addressed by the Fifth Circuit occurred when Respondents failed to give Mayfield and Muhammad notice of the conduct being questioned. The initial suspension letters to Mayfield and Muhammad stated: "The reason for the suspension is that you have failed to comply with Section 4.19(2) of the Rev. Proc. 96-61, Obligations of Participants in the Electronic Filing Program for Form 1040, U.S. Individual Income Tax Return. We have no record of receiving your U.S. Individual Income Tax Return for the 1995 tax return."

After responding to Respondents' asserted reason for suspension, Mayfield received a letter confirming his suspension which stated: "The facts and circumstances stated in our letter proposing to suspend you continue to support our decision to deny your participation in the

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[9] The District Court's departure from plain language and prior practice is further highlighted by the affidavit testimony of Keith DeCoster, a former IRS employee. He testified by affidavit that prior to leaving IRS in February 1997, he audited all EFIN holders in the Houston district annually for "suitability." Moreover, DeCoster's audit included a review of each EFIN holder's tax return filing history for prior years during which he or she held an EFIN. When DeCoster left IRS in February 1997, Mayfield and Muhammad had been approved as EFIN holders for 1997 as they had been for all previous years.

Electronic Filing (ELF) Program." App. 46. The IRS made no mention of any grounds for Mayfield's suspension other than his failure to timely file his 1995 return. However, the Electronic Filing Program History Sheet reflects that on September 8, 1997, Dennis reviewed Mayfield's appeal from her July 24, 1997 letter and "past filing history" and, in making her decision to affirm her own decision of the suspension, she considered other tax return filings of Mayfield. Dennis, however, never advised Mayfield that any other tax return filings were in dispute, or would be used in determining his suspension or appeal of that suspension. Despite the fact that Dennis apparently relied upon Mayfield's past filing history to his detriment, there was nothing in that prior history to justify the penalty imposed upon him. Keith DeCoster, the IRS supervisor who conducted EFIN suitability checks had reviewed those prior returns and repeatedly found Mayfield to be suitable for the Electronic Filing Program. In fact, at the time DeCoster left IRS in 1997, Mayfield had been approved as suitable for electronic filing in each of the years at issue.

Although Dennis advised Mayfield that his suspension was based upon his failure to timely file his 1995 tax return, she not only secretly considered other reasons to suspend Mayfield but communicated those reasons to the IRS Director of Practice who was charged with making the final appellate decision. In an internal memorandum, provided to Petitioners through discovery, Dennis stated: "In addition, Mr. Mayfield had not filed a timely return since 1990". Mayfield was never told that such claims were being made against him and he was never given an opportunity to contest the allegations. Furthermore, any failure to file timely "no tax due returns" would not have

resulted in suspension under the then existing IRS guidelines as evidenced by DeCoster's affidavit testimony and by Mayfield's continued passing of his annual suitability checks until 1997.

Similarly, Muhammad appealed from the letter stating that he was being suspended from the Electronic Filing Program because he failed to timely file his 1995 tax return. However, after this appeal was lodged, IRS informed Muhammad for the first time that the decision to suspend him was based upon a failure to timely file his 1994 and 1995 tax returns. Muhámmad was thus never afforded an opportunity to contest the real reasons for his suspension.

The Fifth Circuit obviously accepted Respondents' claim that IRS's suspensions of the EFINs of Mayfield and Muhammad were consistent with IRS's view that Mayfield and Muhammad, as tax professionals, are subject to higher standards of conduct. Yet IRS made no attempt to bar Mayfield and Muhammad from performing tax preparation services. Moreover, there is no accusation or evidence indicating that the tax returns Mayfield and Muhammad electronically filed on behalf of their numerous clients were anything less than 100% accurate.

The Fifth Circuit also ignored violations of the APA in connection with IRS' final decision on Petitioners' appeals. It is apparent from the written decision of the Director of Practice on Mayfield's and Muhammad's appeals that in addition to relying on the wrong Revenue Procedure, Respondents utilized additional, unmentioned conduct to affirm the suspensions without giving Petitioners the opportunity to contest these grounds. The IRS' decisions affirming Mayfield's and Muhammad's suspensions state that the decision to affirm was "based on the

fact that *among other reasons,* Appellant failed to timely file Form 1040 for 1995." (Emphasis added.) App. 46, 53. There is no further explanation of the "other reasons." As this was IRS' final decision, there was no opportunity for Mayfield and Muhammad to determine the "other reasons" or to contest them. Under the APA, if an agency relies on data in files, it must disclose that information to the adversary for his consideration and comment. *United States Lines,* 584 F.2d at 535. Respondents failed to do so.

In a remarkably similar case, the Eighth Circuit held that "employees and employers have an interest in their employment relations which the Fifth Amendment protects from arbitrary government interference." *Chernin v. Lyng,* 874 F.2d 501, 505 (8th Cir. 1989). In *Chernin,* the plaintiff was fired by a meat packing company because the USDA had determined that he was "unfit" to engage in that business. Accordingly, the government would not provide inspection services to the company while Chernin was involved with the company. *Id.* at 502-03. By refusing to provide inspection services, the USDA effectively applied substantial economic pressure to the employer until the employer and Chernin agreed that Chernin would not "have any business dealings" with the company. *Id.* at 503. Citing this Court's decision in *Truax v. Raich,* 239 U.S. 33 (1915), the Eighth Circuit found that "the common law protects employees at will from outside interference in their employment, and this right provides a constitutional cause of action when a governmental agent unlawfully interferes with the employment relation" which is cognizable under the fifth amendment. *Id.* at 503-06. Moreover, this Court has specifically recognized in *Federal Deposit Ins. Corp. v. Mallen,* 486 U.S. 230

(1988), involving the FDIC's action to prohibit a bank president under indictment from participating in the business of his employer, that:

> It is undisputed that [the bank official's] interest in the right to continue to serve as president of the bank and to participate in the conduct of its affairs is a property right protected by the Fifth Amendment Due Process Clause. . . . [T]he FDIC cannot arbitrarily interfere with [the bank official's] continuing employment relationship with the bank, . . . It is also undisputed that the FDIC's order of suspension affected a deprivation of this property interest. Accordingly, [the bank official] is entitled to the protection of due process of law.

486 U.S. at 240 (citations omitted). Thus, Petitioners clearly have numerous property and liberty interests at issue here which are constitutionally protected.

Petitioners also have a right to freedom of association and speech under the first amendment which has been infringed upon by Respondents. Petitioners have made claims based upon the rights guaranteed by the first and fifth amendments, the deprivation of all of which are actionable. *See, e.g., Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 575 n. 14 (1972).

## IV.

**Under the circumstances of this case, denial of class certification was an abuse of discretion.**

Petitioners sought to certify a class of:

> All persons who at any time since 1989 have had their Electronic Filing Identification Numbers suspended or otherwise have been denied participation in the Electronic Filing Program of the Internal Revenue Service under the provisions

> of the Internal Revenue Service's suitability rules (26 C.F.R. § 601.602) for electronic filers addressing the "timely and accurate tax returns" or the association rules or who have been threatened with suspension of their Electronic Filing Identification Numbers under the association rules.

Despite the fact that Petitioners demonstrated the existence of hundreds of similarly situated putative class members, the Fifth Circuit inexplicably affirmed the denial of certification on the ground that Petitioners had failed to demonstrate the existence of a class.

Their affirmance constitutes an abuse of discretion for numerous reasons. First, the denial was premised not on Petitioners' class description but on the District Court's narrow recharacterization of Petitioners' proposed class, a characterization that focused exclusively on suitability requirements and thus omitted two of the three categories of proposed class members, namely those class members suspended pursuant to the "association" rules and those class members threatened with suspension pursuant to the "association" rules.

Second, the denial was premised on demonstrably false assumptions. In particular, the District Court erroneously stated that the Petitioners had failed to identify "a single taxpayer not associated with Compro-Tax who may belong to the putative class."[10] This assumption is belied by the record. Petitioners have identified approximately one hundred persons who have either had their

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[10] The District Court's focus on taxpayers was inappropriate as the class was focused on tax preparers not taxpayers.

EFINs suspended under the "association" rules or who have been threatened with suspension under the "association" rules. Furthermore, Keith DeCoster, the former IRS Electronic Filing coordinator for the Houston district, confirmed that it was his conservative opinion that IRS routinely suspended between 300 and 700 individuals from the Electronic Filing Program each year due to the "suitability" and "association" rules although it was quite possible the number was over one thousand suspensions per year. Similarly, as the District Court itself noted, such suspensions occurred in other IRS jurisdictions nationwide such as New York and Alabama and Dennis admitted that she personally suspended "numerous unrelated program participants" outside the Compro-Tax family pursuant to the suitability and association rules at issue here.

A further abuse of discretion occurred when the Fifth Circuit affirmed the holding that this case could not be maintained as a class action because of the District Court's belief that the organizational structure of Compro-Tax was "unique". While the structure of Compro-Tax may or may not have been unique, that structure is irrelevant to the determination as to whether this case should proceed as a class action. While some three hundred members associated with Compro-Tax are members of the putative class and their numbers would be sufficient to justify class certification, a relationship to Compro-Tax is unnecessary for inclusion in the class. An individual may be a member of the proposed class if he or she (1) was suspended under the "suitability" rules addressing the "timely and accurate" filing of tax returns where the individual filed an accurate but untimely tax return and was suspended; (2) was suspended pursuant

to the "association" rules; or (3) was threatened with suspension under the "association" rules. As such, association with Compro-Tax is not a prerequisite. Many of the individuals whom Petitioners have identified as receiving letters from IRS threatening suspension of their EFINs if the individual "associated" with either Mayfield, Muhammad, or Compro-Tax were not associates of Compro-Tax, but rather wished to become associates of Compro-Tax or merely planned to attend Compro-Tax classes and its award banquet. Petitioners thus identified the existence of an appropriate class that should have been certified. Moreover, although not addressed by the lower courts, Petitioners' proposed class satisfied the requirements of Rule 23.

## CONCLUSION

The Fifth Circuit's affirmance of the dismissal of Petitioners' case does violence to two bedrock principles of American jurisprudence. First, only conduct which is prohibited at the time it occurs may be punished by the Government; second, the Government is answerable in the federal courts for its own allegedly unlawful conduct when the relief sought is non-monetary. For these reasons and for the other reasons set out in this Petition, a writ of certiorari should be granted to allow this Court to rectify

the unwarranted imbalance between Americans and their government which the Fifth Circuit has created.

Respectfully submitted,

STUART M. NELKIN
NELKIN & NELKIN, P.C.
5417 Chaucer
Houston, TX 77005
(713) 526-4500
*Counsel of Record*

JAY P. NELKIN
NELKIN & NELKIN, P.C.
5417 Chaucer
Houston, TX 77005
(713) 526-4500
*Counsel for Petitioner*

CAROL NELKIN
NELKIN & NELKIN, P.C.
5417 Chaucer
Houston, TX 77005
(713) 526-4500
*Counsel for Petitioner*

February 6, 2002

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 00-20604

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COMPRO-TAX, INC.; JACKIE E. MAYFIELD; YUSUF A. MUHAMMAD; INGA RHODES,

Plaintiffs-Appellants,

versus

INTERNAL REVENUE SERVICE; THELMA DENNIS; UNITED STATES OF AMERICA,

Defendants-Appellees,

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Appeal from the United States District Court
For the Southern District of Texas

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(Filed Sept. 7, 2001)

(H-98-CV-2471)

Before HIGGINBOTHAM, BARKSDALE, and STEWART, Circuit Judges.

PER CURIAM:*

AFFIRMED. *See* 5TH CIR. R. 47.6.

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

| | | |
|---|---|---|
| COMPRO-TAX, INC., et al.,<br><br>Plaintiffs,<br><br>v.<br><br>INTERNAL REVENUE SERVICE, THELMA DENNIS, and THE UNITED STATES OF AMERICA,<br><br>Defendants. | §<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§ | CIVIL ACTION NO. H-98-2471 |

**MEMORANDUM AND ORDER**

Plaintiffs, Compro-Tax, Inc., Jackie E. Mayfield, Yusuf A. Muhammad, and Inga Rhodes (plaintiffs), filed this action seeking declaratory and injunctive relief, attorney's fees, costs, and actual and punitive damages against the United States Department of the Treasury, Internal Revenue Service (IRS), and an individual IRS employee, Thelma Dennis. Plaintiffs allege that the IRS and Dennis violated their federal constitutional and statutory rights under the First and Fifth Amendments, 5 U.S.C. § 552a (the Privacy Act), 5 U.S.C. §§ 701-706 (the Administrative Procedure Act or "APA"), and 26 U.S.C. § 6103, by suspending them from the Electronic Filing Program (EFP) and by threatening to suspend their associates for continuing to share fees with plaintiffs after the suspensions. Pending before the court are Defendant Dennis's Motion to Dismiss or Motion for Summary Judgment (Docket Entry No. 33) and the Federal Defendants' [the IRS and Dennis] Motion for Summary Judgment

Regarding the Administrative Procedures (sic) Act Claims (Docket Entry No. 53).

## I. Background

The court has previously set out the facts of this case and will only briefly do so in this memorandum. Compro-Tax, Inc. is a tax-preparation business arranged like a multi-level marketing program. *See* Plaintiffs' Second Amended Complaint p. 3, ¶ 12 (Docket Entry No. 46). Compro-Tax trains "brokers" who then set up independent tax-preparing businesses that pay a 20% "commission" to Compro-Tax and take a "commission" themselves from the fee charged on each prepared return. *See id.* The actual tax preparer receives at least 45% of the fee charged. *See id.* Mayfield and Muhammad established Compro-Tax, Inc. *See id.* at ¶ 11. They prepare returns, run individual Compro-Tax offices, and also act as officers, board members, and majority shareholders of the corporation. *See id.* at p. 10, ¶ 36. Inga Rhodes is Mayfield's daughter, and works as a tax preparer in his Compro-Tax office. *See id.* at p. 7, ¶ 27. A large part of Compro-Tax's business was conducted through the IRS's Electronic Filing Program, and all three individual plaintiffs held Electronic Filing Identification Numbers (EFINs) issued by the IRS that allowed them to file electronic returns for clients. *See id.* at pp. 4-5, ¶¶ 14-18.

On July 24, 1997, Mayfield and Muhammad received letters from the IRS suspending them from participating in the EFP because of their failure to file personal tax returns for 1995. *See* Letters from James Walsh to Jackie Mayfield and Yusuf Muhammad (July 24, 1997), Exhibits

10 and 17, respectively, to Federal Defendants' Motion for Summary Judgment (Docket Entry No. 53). These letters outlined the administrative appeals process available to Mayfield and Muhammad. *See id.* Both Mayfield and Muhammad utilized the appeals process and received final decisions from the IRS Director of Practice upholding their suspensions. *See* Letter from Robert Brauer to Jackie Mayfield (Apr. 1, 1998), Letter from Robert Brauer to Yusuf Muhammad (Jan. 27, 1998), Exhibits 15 and 23, respectively, to Federal Defendants' Motion for Summary Judgment (Docket Entry No. 53).

Rhodes was suspended from the EFP on March 30, 1998, for continuing her business relationship with Mayfield in violation of the EFP's "association" rules. *See* Letter from James Walsh to Inga Rhodes (Apr. 23, 1998), Exhibit R to Appendix to Plaintiffs' Response to Federal Defendants' Motion for Summary Judgment (Docket Entry No. 60). Other tax preparers associated with Mayfield and Muhammad were sent warning letters by the IRS informing them that Mayfield and Muhammad were suspended from the EFP, and that continued association and fee sharing with them was an independent violation of IRS procedures that subjected the preparers to suspension. *See* Letter from Thelma Dennis to Compro-Tax employees (Apr. 29, 1998), Exhibit 24 to Federal Defendants' Motion for Summary Judgment (Docket Entry No. 53).

Plaintiffs filed suit in this court against the IRS and Dennis on August 3, 1998. *See* Plaintiffs' Complaint (Docket Entry No. 1). Plaintiffs filed an amended complaint on August 11, 1998, adding the United States as a defendant. *See* Plaintiffs' Amended Complaint (Docket

Entry No. 8). The United States then filed a motion to dismiss or for summary judgment on behalf of the IRS and Dennis. *See* Motion to Dismiss for Lack of Subject Matter Jurisdiction and Motion for Summary Judgment (Docket Entry No. 9). The court referred this action to Magistrate Judge Nancy K. Johnson on January 21, 1999. *See* Order (Jan. 21, 1999) (Docket Entry No. 24). The Magistrate Judge concluded that the court had subject matter jurisdiction over plaintiffs' claims for declaratory and injunctive relief against the United States, but that the United States had not waived sovereign immunity regarding any monetary claims by plaintiffs. *See* Magistrate Judge's Memorandum and Recommendation (Docket Entry No. 32). The Magistrate Judge recommended that Compro-Tax, Inc.'s claims against the United States under the APA and the Privacy Act and the claims of all plaintiffs for monetary relief under the APA, the Privacy Act, the United States Constitution, and 26 U.S.C. § 7217 be dismissed, except plaintiffs' claims against Dennis in her individual capacity under *Bivens v. Six Unknown Named Agents*, 91 S.Ct. 1999 (1971). *See* Magistrate Judge's Memorandum and Recommendation (Docket Entry No. 32). The court adopted the recommendations of the Magistrate Judge by order entered May 12, 1999. *See* Order Adopting Magistrate Judge's Memorandum and Recommendation (Docket Entry No. 41). The court withdrew the reference to Judge Johnson on August 16, 1999 (Docket Entry No. 63). The court granted plaintiffs leave to amend their complaint to properly state causes of action according to the Magistrate Judge's recommendations (Docket Entry No. 70).

The live pleading is Plaintiffs' Second Amended Complaint, which alleges that:

> (1) [i]n suspending the individual Plaintiffs' participation in the IRS electronic filing program, Defendants[1] ostensibly relied upon the IRS's association rules, which are so vague and overbroad as to deny Plaintiffs' rights to procedural and substantive due process guaranteed by the Fifth Amendment to the United States Constitution (¶ 43, p. 11);
>
> (2) [i]n arbitrarily and capriciously suspending the individual Plaintiffs' participation in the IRS electronic filing program without meaningful investigation, failure to interview knowledgeable witnesses, refusing to allow Plaintiffs a meaningful opportunity to refute any adverse information against them, and relying on incomplete and false information, Defendants violated the individual Plaintiffs' rights to procedural and substantive due process as guaranteed by the Fifth Amendment . . . (¶ 45, p. 12);

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[1] Despite the Magistrate Judge's order, plaintiffs have failed to specify in their amended complaint which plaintiffs allege each claim against which defendants. Instead, they have copied the language that the Magistrate Judge found unsatisfactory from their prior complaints word for word. The only changes that plaintiffs have made between their first and second amended complaints are: (1) the addition of one paragraph (¶ 32, p. 9) and (2) correction of their plea for relief under a repealed statute by citing the correct statute (¶ 53, p. 13). Although many of their claims were dismissed by order of this court, plaintiffs persist in repleading them.

(3) [i]n threatening and harassing members of Compro-Tax's family of tax return preparers, supervisors, and brokers by threats to suspend their individual right to participation in IRS's electronic filing program unless they immediately end all "association" with the individual and corporate Plaintiffs, Defendants' actions constitute a violation of Plaintiffs' First Amendment rights to freedom of association and the rights of Compro-Tax to procedural and substantive due process as guaranteed by the Fifth Amendment . . . (¶ 47, p. 12);

(4) [i]n performing a slipshod, reckless, malicious, and sham investigation of Plaintiffs' qualifications to continue to participate in the IRS's electronic filing program, Defendants' actions were unconstitutional, arbitrary, capricious, and an illegal abuse of discretion in violation of the Administrative Procedure Act, 5 U.S.C. §§ 701-706[2] (¶ 49, p. 13);

(5) [i]n refusing to comply with Mayfield's and Muhammad's requests pursuant to 5 U.S.C. § 552a(d)(1) and in failing to compile and maintain records concerning Plaintiffs with such accuracy, relevance, timeliness, and

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[2] This claim survives only with respect to the individual plaintiffs; Compro-Tax, Inc.'s claim under the Administrative Procedure Act has already been dismissed by order of this court. *See* Order Adopting Magistrate Judge's Memorandum and Recommendation (Docket Entry No. 41); Magistrate Judge's Memorandum and Recommendation (Docket Entry No. 32). Any remaining claims under the APA are only for injunctive or declaratory relief. *See id.*

completeness as necessary to assure fairness in the determination of Plaintiffs' qualifications, character, rights, and the opportunities of, and benefits, Defendants have violated 5 U.S.C. § 52a(g)(1)(A), (B), (C), and (D) and 5 U.S.C. § 552a(e)(5) and (7) of the Privacy Act[3] (¶ 51, p. 13);

(6) [i]n wilfully and without authority disclosing to third parties including tax return preparers, supervisors and others within the Compro-Tax family that Mayfield and Muhammad had filed their individual tax returns late, Defendants have violated 26 U.S.C. § 6103 for which relief may be had under 26 U.S.C. § 7431 (¶ 53, p. 13);

(7) [i]n wilfully and without authority engaging in a campaign of threats and retaliation, Defendants have violated the Plaintiffs' First Amendment right of freedom of speech (¶ 55, p. 14); and

(8) [i]n wilfully and without authority engaging in a selective campaign of EFIN suspension, threats and retaliation, Defendants have denied Plaintiffs equal protection of the law and due process[4] of the law (¶ 57, p. 14).

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[3] Plaintiffs have repled their claims under the Privacy Act, although these claims have been dismissed by this court as to all plaintiffs against all defendants. *See* Order Adopting Magistrate Judge's Memorandum and Recommendation (Docket Entry No. 41); Magistrate Judge's Memorandum and Recommendation (Docket Entry No. 32). Accordingly, these claims from Plaintiffs' Second Amended Complaint are not properly before the court.

[4] Plaintiffs do not specify under what amendments to the United States Constitution they allege this claim.

Plaintiffs' Second Amended Complaint, pp. 11-14 (Docket Entry No. 46). For convenience and clarity the court will refer to these numbered claims as plaintiffs' "first claim," "second claim," etc.

## II. Sovereign Immunity of Defendants

It is always appropriate for a court to inquire into its subject matter jurisdiction. *See* Fed. R. Civ. P. 12(h)(3), *Smith v. Booth*, 823 F.2d 94 (5th Cir. 1987). "It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." *United States v. Mitchell*, 103 S.Ct. 2961, 2965 (1983). Plaintiffs have failed to specify in their complaint under what theories they assert their constitutional claims, nor do they specify against whom.[5] *See* Plaintiffs' Second Amended Complaint (Docket Entry No. 46). Specifically, plaintiffs' first, second, third, seventh, and eighth claims cite no authority except the Constitution. *See id.* Accordingly, this court must first inquire which of plaintiffs' claims may be entertained against the United States and its agency, the IRS.

Plaintiffs cannot sue the United States unless Congress has expressly waived sovereign immunity for plaintiffs' claim. *See United States v. Nordic Village, Inc.* 112 S.Ct. 1011, 1014-15 (1992). Because plaintiffs have not shown any waiver of sovereign immunity, plaintiffs' first, third, sixth, and seventh claims may not be maintained against

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[5] Each claim asserts only that "Defendants" deprived plaintiffs of some constitutional right. *See* Plaintiffs' Second Amended Complaint (Docket Entry No. 46).

the United States or the IRS and will be dismissed. Liberally construing plaintiffs' second claim, it can be understood to invoke the Administrative Procedure Act and will be dealt with below.[6]

## III. Summary Judgment Standard

Dennis's motion is styled a motion to dismiss or in the alternative for summary judgment. *See* Dennis's Motion to Dismiss or for Summary Judgment (Docket Entry No. 33). Because the court will consider matters beyond the pleadings, including the affidavits and exhibits attached to the pleadings, the court will treat the motion as one for summary judgment. *See* Fed. R. Civ. P. 12(c).

Summary judgment is authorized if the movant establishes that there is no genuine dispute about any material fact and the law entitles it to judgment. Fed. R. Civ. P. 56(c). The Supreme Court has interpreted the plain language of Rule 56(c) to mandate "the entry of summary judgment, after adequate time for discovery and upon motion, against any party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 106 S.Ct. 2548, 2552 (1986). The nonmoving party must go beyond the pleadings and show by affidavits, depositions, answers to interrogatories, or admissions on file that specific facts exist over which there is a genuine

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[6] Plaintiffs' *Bivens* claims against Dennis for violations of plaintiffs' constitutional rights are discussed in Part IV, *infra*.

issue for trial. *See Celotex,* 106 S.Ct. at 2553. Applicable substantive law determines what factual issues are material. *See Anderson v. Liberty Lobby, Inc.,* 106 S.Ct. 2505, 2510 (1986). Disputes about material facts are "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *See Anderson,* 106 S.Ct. at 2511. All justifiable inferences will be drawn in the nonmovant's favor, *see Anderson,* 106 S.Ct. at 2513, but conclusory affidavits will not suffice to create or negate a genuine issue of fact. *See Reese v. Anderson,* 926 F.2d 494, 498 (5th Cir. 1986). Admissibility of evidence on a motion for summary judgment is subject to the standards and rules that govern evidence at trial. *See Rushing v. Kansas City Southern Railway Co.,* 185 F.3d 496 (5th Cir. 1999). This court is not obligated to fish through the sizable record in this case to find evidence to support plaintiffs' case; instead, the nonmovant must identify specific evidence and articulate precisely how it supports his claim. *See Ragas v. Tennessee Gas Pipeline Co.,* 136 F.3d 455, 458 (5th Cir. 1998).

## IV. Dennis's Motion for Summary Judgment

Plaintiffs assert a claim against Dennis for a violation of federal constitutional law under *Bivens v. Six Unknown Named Agents,* 91 S.Ct. 1999, 2005 (1971). Dennis argues that she is entitled to qualified immunity from Compro-Tax's claims. Federal officials are immune from suit as long as "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Mitchell v. Forsyth,* 105 S.Ct. 2806 (1985). Once a federal employee establishes that she acted in good faith and within her authority, the plaintiff

must establish a violation of clearly established federal rights. *See Salas v. Carpenter,* 980 F.2d 299, (5th Cir. 1992). To overcome a claim of qualified immunity plaintiffs must prove that: (1) the plaintiffs have asserted a constitutional or federal statutory violation; (2) the law regarding the alleged violation was clearly established at the time of the alleged violation; and (3) the record shows that the violation occurred or at minimum that a genuine issue of material fact exists as to whether the defendant committed the alleged violation. *See Brown v. Nationsbank Corp., et al.,* 188 F.3d 579, 587 (5th Cir. 1999), *citing Kerr v. Lyford,* 171 F.3d 330, 338 (5th Cir. 1999). If the court concludes that the defendant's conduct violated clearly established law the court must then determine whether the defendant's conduct was objectively reasonable. *See id., citing Wren v. Towe,* 130 F.3d 1154, 1159 (5th Cir. 1997).[7]

**A. Plaintiffs' *Bivens* Claim**

In their first claim plaintiffs allege that Dennis violated the Constitution by enforcing unconstitutionally vague and overbroad IRS regulations against them. This allegation fails to state a violation of clearly established constitutional or statutory law by Dennis. Plaintiffs acknowledge that their constitutional claims rest on a novel legal theory. *See* Plaintiffs' Response to Defendant Dennis's Motion to Dismiss or Motion for Summary Judgment, p. 6 (Docket Entry No. 44). By definition, Dennis

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[7] Plaintiffs' Motion for Continuance on Dennis's Motion for Summary Judgment (Docket Entry No. 44 at p. 3) is **DENIED**. Since that motion was filed plaintiffs have had ample opportunities for discovery.

cannot have violated clearly established constitutional law by failing to anticipate plaintiffs' novel theory. *Cf. Mitchell*, 105 S.Ct. at 2820 (holding that law was not "clearly established" where the Supreme Court had not yet held an act unconstitutional). Plaintiffs cite no authority for their interpretation of the United States Constitution and the court finds none. Because Dennis was acting within her authority when she enforced the regulations against plaintiffs, Dennis is entitled to qualified immunity on plaintiffs' first claim.

Likewise, plaintiffs' second claim, that Dennis denied them procedural due process in suspending them, also fails to state a violation of clearly established law. The regulations state that immediate suspension is proper for failure to file timely returns. *See* Rev. Proc. 96-61, 1196-2 C.B. 401, § 13.07(1) with reference to § 4.19(2). The regulations further state what process plaintiffs were entitled to receive incident to their suspensions. *See id.* at § 15. Both Mayfield and Muhammad utilized the full appeals process and received final decisions from the IRS Director of Practice upholding their suspensions. *See* Letter from Robert Brauer to Jackie Mayfield (Apr. 1, 1998), Letter from Robert Brauer to Yusuf Muhammad (Jan. 27, 1998), Exhibits 15 and 23 to Federal Defendants' Motion for Summary Judgment (Docket Entry No. 53). Rhodes did not pursue the full appeals process, but was informed of the process by the IRS. *See* Letter from James Walsh to Inga Rhodes (Apr. 23, 1998), Exhibit R to Appendix to Plaintiffs' Response to Federal Defendants' Motion for Summary Judgment (Docket Entry No. 60). Because the record reflects that plaintiffs received all of the process to which they were entitled by the regulations, Dennis is

entitled to qualified immunity against plaintiffs' second claim.

Plaintiffs' third claim, alleging that Dennis violated the First and Fifth Amendment rights of plaintiffs by "threatening and harassing" Compro-Tax employees with suspension, fails to state a violation of clearly established law. The regulations clearly afford Dennis discretion to immediately suspend or to warn those who violate the EFP regulations. *See* Rev. Proc. 96-61, § 13.07(1) with reference to § 4.19(12). Plaintiffs offer no competent summary judgment evidence of harassment by Dennis. The only evidence of contacts between Dennis and Compro-Tax employees in the record are the warning letters Dennis sent to the employees.[8] *See* Letter from Thelma Dennis to [Compro-Tax Employees], Exhibit 24 to Federal Defendants' Motion for Summary Judgment (Docket Entry No. 53) This "threat" of suspension is authorized by the regulations. *See* Rev. Proc. 96-61, § 13.07(1) with reference to § 4.19(12). Because plaintiffs have not shown that Dennis violated these regulations, Dennis is entitled to qualified immunity against plaintiffs' third claim that

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[8] Plaintiffs also allege in the affidavits they attach to their Appendix to their Response to the Federal Defendants' Motion for Summary Judgment (Docket Entry No. 60) that Dennis told Compro-Tax employees and outsiders thinking of attending Compro-Tax seminars that Mayfield and Muhammad had been suspended and threatened anyone who associated with suspended plaintiffs. Affidavits of Mayfield and Muhammad, Exhibits A and B to appendix to Response to Federal Defendants' Motion (Docket Entry No. 60). Because plaintiffs provide no basis for this conclusory allegation, it is not competent summary judgment evidence, even assuming it were relevant to defeat Dennis's qualified immunity defense.

she violated federal law by warning plaintiffs' Compro-Tax associates of possible suspension under the regulations.

Plaintiffs' fourth claim is addressed in Part V, *infra*. For the reasons explained there, the court concludes that plaintiffs fail to state a claim and that Dennis is entitled to summary judgment on plaintiffs' fourth claim.[9]

Plaintiffs' seventh claim is conclusory and not supported by the record. Plaintiffs allege that Dennis engaged in a wilful and unauthorized campaign of threats and retaliation against them in violation of the First Amendment. Plaintiffs have proffered no evidence of any "campaign," nor have they alleged facts sufficient to plead retaliation. Plaintiffs' own conclusory allegations are not competent summary judgment evidence. *See Reese*, 926 F.2d at 498. Accordingly, Dennis is entitled to summary judgment on plaintiffs' seventh claim..

Plaintiffs' eighth claim also alleges threats and retaliation, adding an allegation of a "selective campaign of EFIN suspension." *See* Plaintiffs' Second Amended Complaint, p. 14 (Docket Entry No. 46) Plaintiffs fail to provide any facts that suggest selective enforcement, such as who was treated differently or how that person was similarly situated to plaintiffs. *See id.*[10] Plaintiffs fail even

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[9] Plaintiffs' fifth claim has already been dismissed by the court. Plaintiffs' sixth claim is discussed in Part IV.B, *infra*.

[10] Plaintiffs offer the affidavit of Keith DeCoster, the former occupant of Thelma Dennis's position with the IRS. Electronic Filing Coordinator. *See* Affidavit of Keith DeCoster, Exhibit D to Appendix to Plaintiffs' Response (Docket Entry No. 60). He says

to identify a specific Amendment to the Constitution that Dennis allegedly violated by her alleged selective campaign. Presumably, plaintiffs intend to bring their claims under the Fifth Amendment because the Fourteenth Amendment provides no remedy against the federal government. *See Richard v. Hinson*, 70 F.3d 415, 416-17 (5th Cir. 1995). The conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation. *See Oyler v. Boles*, 82 S.Ct. 501, 506 (1962). For selective enforcement to violate the Constitution plaintiff must show that the selective enforcement was "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *See Allred's Produce v. United States Dept. of Agriculture*, 178 F.3d 743, 748 (5th Cir. 1999), *quoting Oyler*, 82 S.Ct. at 506. Plaintiffs have neither pled nor proffered evidence of any unjustifiable standard or arbitrary classification, alleging only that they are *African Americans*. They do not identify any other person who filed late tax returns and yet was allowed to continue in the EFP after a suitability check revealed that fact.

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only that his office conducted suitability checks and never suspended plaintiffs. *See id.* Thelma Dennis was not, however, the only Electronic Filing Coordinator who suspended EFP participants for filing late returns. *See Brenner Income Tax Ctrs., Inc.*, 2000 WL 279878, slip op. at p. 2, ___ F.Supp.2d ___ (S.D.N.Y. March 1, 2000); *Forehand v. IRS*, 877 F.Supp. 592, 596 (M.D. Ala. 1995). Dennis testified that plaintiffs were not the only people that she suspended due to the suitability checks in question. *See* Declaration of Thelma Dennis ¶ 6, Exhibit 29 to Federal Defendants' Motion for Summary Judgment (Docket Entry No. 53). The fact that plaintiffs were not earlier suspended is not evidence of selective enforcement.

Although other Compro-Tax "associates" were warned of the impropriety under the association rules of continuing to share fees with Mayfield and Muhammad instead of being immediately suspended, *see* Plaintiffs' Second Amended Complaint, p. 10 (Docket Entry No. 10), plaintiffs fail to suggest that any unjustifiable standard differentiated them from the rest of the "Compro-Tax family." Because the regulations clearly give the IRS discretion to warn or suspend upon a violation of the EFP rules, *see* Rev. Proc. 96-61, 1196-2 C.B. 401, § 13.07(1), with reference to § 4.19(12), this distinction does not establish a violation of clearly established constitutional law. Furthermore, plaintiffs produce no competent summary judgment evidence that any selective enforcement occurred much less was based on unconstitutional animus. Accordingly, Dennis is entitled to qualified immunity against plaintiffs' eighth claim because plaintiffs have failed to show Dennis violated clearly established constitutional law.

**B. Plaintiffs' Claims Under 26 U.S.C. § 6103 and § 7431**

Plaintiffs' sixth claim alleges that Dennis violated 26 U.S.C. §§ 6103 and 7431 by disclosing confidential tax information of plaintiffs to other Compro-Tax associates. Because Dennis is not a proper party to a suit under 26 U.S.C. § 7431, she is entitled to summary judgment on this claim. (Because the United States has not moved for summary judgment on plaintiffs' disclosure claims, the plaintiffs' claims against the United States for violation of §§ 6301 and 7431 remain pending.)

## V. The Federal Defendants' Motion for Summary Judgment Regarding APA Claims

In their fourth claim plaintiffs allege that a number of acts by the IRS were arbitrary and capricious or in violation of the Constitution and the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706. Although not stated in so many words, the general tenor of Plaintiffs' Second Amended Complaint appears to allege that the IRS's decision to suspend them from the EFP program violated the APA. They also allege that the IRS investigation that led to plaintiffs' suspensions violated the APA. *See* Plaintiffs' Second Amended Complaint, p. 13 (Docket Entry No. 46). The IRS argues that it is entitled to summary judgment on plaintiffs' APA claims because the agency's actions are committed by law to agency discretion and, therefore, not subject to judicial review. Alternatively, the IRS argues that, to the extent that its actions are reviewable by this court, they do not violate the applicable APA standard. The court concludes that because there is no statutory command precluding judicial review of the IRS's decisions and because there is no statutory command to employ a standard of review other than the arbitrary and capricious standard of review prescribed by the APA, that standard applies. 5 U.S.C. § 706; *Citizens to Preserve Overton Park, Inc. v. Volpe*, 91 S.Ct. 814, 822-825 (1971).

### A. Plaintiffs' Suspensions from the EFP

The APA's arbitrary and capricious standard of review is narrow and requires only that the agency articulated a rational relationship between the facts found and

the choice made. *See Texas Office of Public Utility Counsel*, 183 F.3d 393, 412 (5th Cir. 1999), *citing Harris v. United States*, 19 F.3d 1090, 1096 (5th Cir. 1994). The IRS found that plaintiffs Mayfield and Muhammad violated the suitability rules of the EFP program by failing to timely file returns for the 1995 tax year. *See* Letter from Robert Brauer to Jackie Mayfield (Apr. 1, 1998), Letter from Robert Brauer to Yusuf Muhammad (Jan. 27, 1998), Exhibits 15 and 23, respectively, to Federal Defendants' Motion for Summary Judgment (Docket Entry No. 53).[11] This is a clear violation of the EFP suitability rules and allows the IRS to immediately suspend EFP participants. *See* Rev. Proc. 96-61, 1196-2 C.B. 401, § 13.07(1), with reference to § 4.19(2) (codified at C.F.R. 601.602 et seq.).[12]

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[11] Indeed, the record reflects that plaintiff Mayfield did not file a timely personal return for the years 1990 through 1996. *See* IRS Memorandum to Director of Practice from District Office Electronic Filing Coordinator (Dennis) (Feb. 9, 1998), Exhibit N to Appendix to Plaintiffs' Response to Defendants' Motion for Summary Judgment (Docket Entry No. 60).

[12] Mayfield and Muhammad argue that the rules from 1995 or 1996 should apply to them and that the revenue procedure then in force did not allow for suspension for filing of a late return where no tax was due. *See* Plaintiffs' Response to Federal Defendants' Motion for Summary Judgment, p. 17 (Docket Entry No. 59). The appropriate section of Rev. Proc. 96-61 in 1995 and 1996 was § 4.12(2); it is substantially the same as § 4.19(2). In 1995, § 4.12(2) allowed suspension from the EFP for "failure to file timely and accurate business or personal tax returns." Rev. Proc. 96-61, 1196-2 C.B. 401, § 4.12(2) (1995) (codified at C.F.R. 601.602 *et seq.*). The current version at § 4.19(2) states "failure to file timely and accurate tax returns, including returns indicating that no tax is due." Rev. Proc. 96-61, 1196-2 C.B. 401, § 4.19(2) (codified at C.F.R. 601.602 *et seq.*). Plaintiffs argue that the change in the current version of the rule

The IRS stated why Mayfield and Muhammad were being suspended and cited Revenue Procedure 96-61 § 4.19(2). *See* Letter from James Walsh to Jackie Mayfield (July 24, 1997) and Letter from James Walsh to Yusuf Muhammad (July 24, 1997), Exhibits E and F, respectively, to Appendix to Plaintiffs' Response to Federal Defendants' Motion for Summary Judgment (Docket Entry No. 60).

The IRS also explains the reason for the rules and for their application to Mayfield and Muhammad. *See* Declaration of Patricia Howarth, Exhibit 25 to Federal Defendants' Motion for Summary Judgment (Docket Entry No. 53). Electronic filing subjects the IRS to increased risk of loss and fraud because refunds are issued much faster and returns are filed through a third party. *See id.* at ¶ 2. The IRS therefore needs greater assurances with this greatly eased filing procedure that third-party filers are conscientious and honest. *See id.* at ¶ 4. Failing to file personal or business returns reflects an inability to conscientiously follow IRS rules and a lack of integrity. *See id.* at ¶ 6. The court concludes that the IRS has articulated a rational relationship between the facts found (failure to file personal returns) and the action taken (two-year suspension from electronic filing of other people's returns). Accordingly, the IRS's actions in suspending Mayfield and Muhammad were neither arbitrary nor capricious under the APA.

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means that, before the change, tax returns where no tax was due would not warrant suspension. Plaintiffs cite no authority for this interpretation. The court concludes that the plain language of the prior revenue rule encompassed both tax returns where tax was due and those where no tax was due.

The "association rules" under which Rhodes was suspended from the EFP forbid "knowingly and directly or indirectly accepting employment as an associate, correspondent, or as a sub-agent from, or sharing fees with any person who has been . . . suspended from the Electronic Filing Program." Rev. Proc. 96-61, § 4.19(12) (emphasis added). Section 13.07 makes reference to section 4.19 and provides that EFP participants may be immediately suspended for violations of section 4.19. *See* Rev. Proc. 96-61, § 13.07. Rhodes denies that she ever charged fees for electronic filing, or shared those fees with Mayfield or Muhammad. *See* Affidavit of Inga Rhodes, Exhibit C to Appendix to Plaintiffs' Response to Federal Defendants' Motion (Docket Entry No. 6). However, Rhodes admits that she was employed by her father's office and corporation. *See id.* Mayfield and Muhammad were suspended from the EFP program for violation of the suitability rules. The association rules provide for immediate suspension of any EFP participant who is employed by or shares fees with a suspended participant. *See* Rev. Proc. 66-61, 1196-2 C.B. 401, § 13.07(1) with reference to § 4.19(12). Rhodes was suspended for violating the association rules, and her suspension notice articulated why and under what regulations the IRS acted. *See* Letter from James Walsh to Inga Rhodes (Apr. 23, 1998), Exhibit R to Appendix to Plaintiffs' Response to Federal Defendants' Motion for Summary Judgment (Docket Entry No. 60). The IRS's stated reason for the association rules is to prevent suspended EFP filers from circumventing the suitability rules by continuing to operate in another's name. *See* Declaration of Patricia Howarth at ¶ 8, Exhibit 25 to

Federal Defendants' Motion for Summary Judgment (Docket Entry No. 53). Because the IRS articulated a rational connection between the facts found (Rhodes' association through employment with Mayfield, a suspended EFP participant) and the action taken (Rhodes' suspension), the IRS's action was neither arbitrary nor capricious under the APA.

**B. The IRS's Investigation of Plaintiffs**

Plaintiffs challenge the IRS's "slipshod, reckless, malicious, and sham investigation" of their qualifications as a violation of the APA. *See* Plaintiffs' Second Amended Complaint, p. 13 (Docket Entry No. 46). Plaintiffs have failed to plead how the investigation was a "sham" or what aspects of the IRS investigation they challenge. While Rule 8 of the Federal Rules of Civil Procedure requires only a "pleading which sets forth a . . . short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a), Plaintiffs' Second Amended Complaint does not meet this standard. Plaintiffs' Second Amended Complaint lacks sufficient detail to provide notice to the IRS of what agency actions are at issue and what portion of the APA entitles plaintiffs to relief. More than bare assertion of legal conclusions is required to satisfy the policy of fair notice in federal pleading. *See Askanase v. Fatjo*, 148 F.R.D. 570, 573 (S.D. Tex. 1993). Because plaintiffs have already had three chances to properly plead a cause of action against the IRS, the court will not afford plaintiffs another opportunity to amend their complaint. Instead, the court will dismiss this claim with prejudice.

Alternatively, even if this claim had been sufficiently pled to afford notice to defendants, plaintiffs have presented no evidence to support this claim. Plaintiffs have the burden of proving that the IRS investigation of their qualifications was arbitrary or capricious. Plaintiffs offer only their own affidavits, which make conclusory allegations that the IRS bore them animus. *See* Appendix to Plaintiffs' Response to Federal Defendants' Motion for Summary Judgment (Docket Entry No. 60). Everything else offered by plaintiffs consists of IRS regulations, file material, and correspondence evidencing careful review by the IRS of the plaintiffs' participation in and suspension from the EFP at each stage of the process. *See id.* Conclusory affidavits will not create a genuine issue of material fact. *See Reese v. Anderson*, 926 F.2d 494, 498 (5th Cir. 1986). Because plaintiffs offer no competent summary judgment evidence to support their claim that the IRS conducted a sham investigation, defendants' motion for summary judgment will be granted.

## VI. Conclusions and Order

This court does not have jurisdiction to hear plaintiffs' claims under the United States Constitution against the United States (or the IRS) because the United States has not waived sovereign immunity. Accordingly, plaintiffs' first, third, seventh, and eighth claims against the United States are **DISMISSED with prejudice**. Plaintiffs' fifth claim against the United States has already been resolved against them.

Because plaintiffs have failed to overcome Dennis's defense of qualified immunity, because plaintiffs' fifth

claim against Dennis has already been resolved against plaintiffs, and because Dennis is not a proper party to plaintiffs' sixth claim, Defendant Dennis's Motion for Summary Judgment (Docket Entry No. 33) is **GRANTED**. All claims against Dennis are **DISMISSED with prejudice**.

Plaintiffs have failed to prove that the IRS or Dennis acted arbitrarily and capriciously, abused their discretion, or otherwise failed to act in accordance with the law, Furthermore, Plaintiffs' fourth claim fails to state a claim under the rules applicable to federal pleading. Accordingly, the Federal Defendants' Motion for Summary Judgment Regarding the Administrative Procedures (sic) Act Claims (Docket Entry No. 53) is **GRANTED**; and plaintiffs' second and fourth claims are **DISMISSED with prejudice.**

The only remaining claim in this action is plaintiffs' sixth claim under 26 U.S.C. §§ 6103 and 7431 against the United States.

**SIGNED** at Houston, Texas, on this 27th day of March, 2000.

/s/ Sim Lake
SIM LAKE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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| COMPRO-TAX, INC., et al., | § | |
| | § | |
| Plaintiffs, | § | CIVIL ACTION |
| | § | |
| v. | § | NO. H-98-2471 |
| | § | |
| INTERNAL REVENUE SERVICE and THELMA DENNIS, | § | (Filed Sep. 14, 1999) |
| | § | |
| | § | |
| Defendants. | § | |

**ORDER DENYING CLASS CERTIFICATION**

Pending before the court is Plaintiffs' Motion for Class Certification (Docket Entry No. 15). Plaintiff seeks to certify a class of "[a]ll persons who at any time since 1989 have had their Electronic Filing Identification Numbers suspended or otherwise have been denied participation in the Electronic Filing Program of the Internal Revenue Service under the . . . suitability rules." Plaintiffs argue that the proposed class is properly certifiable under Fed. R. Civ. P. 23(b)(2) or (3). The court finds that a class action is inappropriate in this action for several reasons.

Rule 23(a)'s requirements of numerosity, commonality, typicality, and adequacy of representation must be met in order to certify a class. However, the threshold requirement under Rule 23(a) is that a class in fact exists. *See Barela v. El Paso Natural Gas Co.*, 1989 WL 100778 (W.D. Tex 1989); 7A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 1760, p. 115 (1998 West Supp.). There must be an identifiable class and plaintiffs must be a member of that class. *See In re A.H. Robins Co.*,

*Inc.*, 880 F.2d 709 (4th Cir. 1989), *abrogated on other grounds by Amchem Prods., Inc. v. Windsor*, 117 S.Ct. 2231 (1997). Plaintiffs here have failed to meet the burden of alleging that a class in fact exists. Plaintiffs have not shown that the interests of the putative class will be adequately represented by the plaintiffs because plaintiffs allege that their method of doing business is unique. *See* [Plaintiffs'] Second Amended Complaint (Docket Entry No. 46 at p. 3). They have not alleged how their situation resembles that of a single tax preparer who is not associated with Compro-Tax, Inc. They have not identified a single taxpayer not associated with Compro-Tax who may belong to the putative class. Under these circumstances plaintiffs are not entitled to maintain a class because they have failed to show the existence of a class whose members have been similarly treated by the defendants. *See McLendon v. M. David Lowe Personnel Servs., Inc.*, 83 F.R.D. 204, 206 (S.D. Tex. 1979).

Furthermore, the first prerequisite of an action sought to be certified under Rule 23(b)(2) demands that the "party opposing the class has acted or refused to act on grounds generally applicable to the class." This requires that the conduct alleged be premised on a ground applicable to the entire class. *See McLendon*, 83 F.R.D. at 206. Plaintiffs allege that their organization of the "Compro-Tax family of tax preparers" is unique. Plaintiffs do not allege any factual basis to believe that any member of the putative class outside of the "Compro-Tax family" has been treated as the plaintiffs were treated. The questions of law or fact applicable to plaintiffs are therefore applicable, at most, only to other employees of Compro-Tax, Inc. The court finds that the

individual issues related to the conduct of these particular plaintiffs predominate over common questions of law or fact under Rule 23(b)(3). Accordingly, Plaintiffs' Motion to Certify a Class (Docket Entry No. 15) is **DENIED.**

**SIGNED** at Houston, Texas, this 13th day of September, 1999.

/s/ Sim Lake
SIM LAKE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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| COMPRO-TAX, INC.<br>JACKIE E. MAYFIELD,<br>YUSUF A. MUHAMMAD,<br>and INGA RHODES,<br><br>Plaintiffs,<br><br>vs.<br><br>INTERNAL REVENUE SERVICE, et al<br><br>Defendant. | §<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§<br>§ | CIVIL ACTION<br>NO. H-98-2471<br><br>(Filed May 12, 1999) |

ORDER ADOPTING MAGISTRATE JUDGE'S MEMORANDUM AND RECOMMENDATION

The Court has reviewed the Magistrate Judge's Memorandum and Recommendation and the objections thereto, and is of the opinion that said Memorandum and Recommendation should be adopted by this Court.

It is, therefore, ORDERED, ADJUDGED and DECREED that the Memorandum and Recommendation is hereby adopted by this Court.

The Clerk shall send copies of this Order to the respective parties.

DONE at Houston, Texas, this 12th day of May, 1999.

/s/ Sim Lake
SIM LAKE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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|---|---|---|
| COMPRO-TAX, INC. JACKIE E. MAYFIELD, YUSUF A. MUHAMMAD, and INGA RHODES, Plaintiffs, | § | Civil Action No. H-98-2471 |
| vs. | § | |
| INTERNAL REVENUE SERVICE, et al. Defendants. | § | |

## MEMORANDUM AND RECOMMENDATION

Pending before the Court[1] is the following motion: Motion to Dismiss for Lack of Subject Matter Jurisdiction and Motion for Summary Judgment filed by the United States. (Docket Entry #9) and the responses filed thereto. For the reasons discussed below, it is RECOMMENDED that the motion be GRANTED in part, DENIED in part.

### I. Case Background

This action involves a dispute between the Plaintiffs and the Department of Treasury, Internal Revenue Service concerning Plaintiffs Mayfield and Muhammad's suspensions from the Internal Revenue Service Electronic Return

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[1] This case was referred to the undersigned pursuant to 28 U.S.C. § 636(b), and the Cost and Delay Reduction Plan under the Civil Justice Reform Act. (Docket Entry #24).

Filing Program and the secondary enforcement of the electronic filing rules against Plaintiff Rhodes for her continued association with the other suspended plaintiffs. Plaintiffs allege violations of the Privacy Act, 5 U.S.C. § 552a, the due process clause of the Fifth Amendment, the association clause of the First Amendment, and unlawful disclosures of taxpayer information.

Plaintiffs Mayfield and Muhammad own Compro-Tax, Inc. a corporation which Plaintiffs describe as a "multi-level marketing" structure. According to the Amended Complaint, Compro-Tax, Inc. does not prepare or file any tax returns, but it trains tax preparers and allows those trained to use the Compro-Tax name in marketing their services as tax return preparers. Compro-Tax, Inc. receives a 20% "commission" from each tax preparation fee earned by one of its "brokerages." Each brokerage pays a percentage of the tax preparation fee to the return preparer and the supervisors of the return preparer on a pre-set basis. The Commission setup is similar to a pyramid distributorship/marketing structure.

In 1988, Plaintiffs Mayfield and Muhammad applied to participate in the electronic filing program with the IRS. To be eligible to apply for participation in the program, a person must have filed "timely and accurate" tax returns. Failure to maintain eligibility requirements is a basis for a person's suspension from the program. *See* Rev. Pro. 96-61 Sections 4.19(2) and 13.07(1) (rev'd Jan. 1997).

The Plaintiffs signed the applications to participate in the program, acknowledging their understanding that if they did not comply with all of the provisions of the

program, they would no longer be allowed to participate. Plaintiffs Mayfield and Muhammad were accepted into the program in 1988 and obtained Electronic Filing Identification Numbers (EFIN's).

In July 1997, both Mayfield and Muhammad received notices from the IRS proposing to suspend their EFIN's, effective immediately. Muhammad was informed that the reason his suspension from the program was proposed was because he failed to timely file his 1995 individual income tax return, a violation of Section 4.19(2) of the Revenue Procedure 96-61. The letter, dated July 24, 1997, related that the IRS had no record of receiving his 1995 income tax return. Muhammad filed the return on July 31, 1997, one week later.

Plaintiff Mayfield received a similar letter, proposing to suspend his participation in the program because he had not timely filed his 1995 individual income tax return.

Each Plaintiff was informed that that [sic] he had the right to appeal within 30 days, during which time he could not participate in the program. Both Plaintiffs appealed, citing various personal and business reasons why their 1995 individual income tax returns had not been timely filed.

On December 15, 1997, the IRS District Director upheld the suspension of Mayfield from the electronic filing program based on his failure to timely file his 1995 individual income tax return. Mayfield was informed of his right to appeal this decision to the Director of Practice of the Department of Treasury in Washington, D.C. On April 1, 1998, the Director of Practice upheld Mayfield's

suspension. In his written decision, the Director found that Mayfield had failed to demonstrate reasonable cause for his [admitted] failure to timely file his 1995 return.

Similarly, Muhammad's appeal was rejected by the Houston District Director and by the Director of Practice in Washington, D.C. In a letter dated November 10, 1997, the District Director found that Muhammad's reasons for not filing his 1995 individual income tax return – not prioritizing filing of his 1995 return and a hard disk crash – did not establish reasonable cause for the failure to timely file the return. The District Director found that Muhammad's proffered reasons for the late filing were not credible in light of Muhammad's late filing of his 1994 individual income tax return and the availability of obtaining an extension to file the return if needed. On January 27, 1998, this decision was upheld by the Director of Practice.

Plaintiff Rhodes is the daughter of Plaintiff Mayfield and shares an office with him. Plaintiff Rhodes' EFIN was suspended for her business association with Mayfield based on Rev. Procedure 96-61, Section 4.12(11) and (12). Those sections prohibit, among other things, employing or accepting assistance from a person suspended from the electronic filing program. Those sections also prohibit a person from sharing fees with a person who has been suspended from the electronic filing program. *See also* 26 C.F.R. §§ 601, 602, Rev. Pro. 94-63, Section 4.12(11) and (12). Based on the shared commission structure of Compro-Tax, Inc., Mayfield and Muhammad, as owners of Compro-Tax, Inc., receive income from other participants in the electronic filing program.

On August 3, 1998, this action was filed against the Internal Revenue Service and Thelma Dennis, the local IRS employee who initiated the suspension process of Plaintiffs Mayfield, Muhammad, and Rhodes.

II. Motion to Dismiss

Defendants have moved to dismiss claiming that the court lacks subject matter jurisdiction over several of the claims made in the complaint based on sovereign immunity.

Subject matter jurisdiction is determined at the time that the complaint is filed. *Carney v. Resolution Trust Co.*, 19 F.3d 950, 954 (5th Cir. 994). "The sovereignty of the United States raises a presumption against its stability, unless it is clearly shown; nor should a court enlarge its liability to suit conferred beyond what the language requires." *Eastern Transport Co. v. United States*, 272 U.S. 675, 686 (1927).

A. Claims arising under the U.S. Constitution

Plaintiffs Mayfield, Muhammad, and Rhodes have challenged the constitutionality of certain provisions of the "suitability" and "association" rules promulgated by the IRS under the Electronic Filing Program. These challenges do not directly implicate any issue involving the imposition or collection of taxes which are expressly excluded from the jurisdiction conferred under the Declaratory Judgment Act, 28 U.S.C. § 2201. Clearly, the

court has subject matter jurisdiction to hear claims concerning the constitutionality of federal rules and regulations pursuant to 28 U.S.C. §§ 1331 and 2201.

On the other hand, the court lacks jurisdiction to hear any claim seeking monetary relief for a constitutional violation. The United States has not waived sovereign immunity for monetary claims arising out of the wrongdoing of its employes, except through the Federal Tort Claims Act, 28 U.S.C. § 2675, et seq. Plaintiffs have failed [sic] allege any claim of jurisdiction pursuant to the Federal Tort Claims Act. Therefore, Plaintiffs may seek declaratory and injunctive relief only against the United States for these alleged constitutional violations.

B. Claims arising under the Administrative Procedures Act

This court also has jurisdiction pursuant to 5 U.S.C. § 702 to review the final agency decisions suspending Plaintiffs Mayfield, Muhammad and Rhodes from the electronic filing program. The Administrative Procedures Act, 5 U.S.C. § 706, permits the court to consider whether the agency's actions were contrary to a constitutional right, power, privilege or immunity.[2] The court notes that

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[2] While the United States argues that this court would not have jurisdiction under the Administrative Procedures Act to review agency actions committed to agency discretion by law, the United States failed to make any legal argument to support this assertion, other than to cite to *Heckler v. Chaney*, 470 U.S. 821, 828 (1985). Consequently, the court will not consider at this time whether judicial review of Plaintiffs' suspensions is precluded by 5 U.S.C. § 701(a)(2).

the Administrative Procedures Act does not confer jurisdiction to award monetary relief. Plaintiffs Mayfield, Muhammad, and Rhodes may seek judicial review of the final agency decisions of the Internal Revenue Service.

On the other hand, Compro-Tax, Inc. has not alleged that it is the subject of a final agency decision. Therefore the court concludes that it has failed to state a claim for relief under the Administrative Procedures Act. It is RECOMMENDED that any claim by Compro-Tax, Inc. under the Administrative Procedures Act be DISMISSED.

C. Claims arising under the Privacy Act

Plaintiffs have sought relief under the Privacy Act, 5 U.S.C. § 552a, claiming that the agency failed to compile and maintain accurate, timely, and complete records in that the agency has refused to alter its records to reflect that Plaintiffs were "suitable" to participate in the electronic filing program.

Defendants argue that this court lacks subject matter jurisdiction to hear Plaintiffs' cause of action under the Privacy Act because Plaintiffs have failed to exhaust their administrative remedies prior to filing this cause.

Exhaustion of administrative remedies is not a jurisdictional prerequisite to filing under the Privacy Act. *Taylor v. U.S. Treas. Dept.*, 127 F.3d 470, 475 (5th Cir. 1997). Hence this action is not appropriately dismissed pursuant to Rule 12(b)(1). A dismissal for failure to exhaust administrative remedies is more appropriately considered pursuant to Rule 12(b)(6). *Taylor v. U.S.*, 127 F.3d at 476.

Plaintiffs contend that their action is brought pursuant to 5 U.S.C. § 552a(g)(1)(C) which authorizes a civil action be brought whenever any agency:

> (C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, . . . or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual.
>
> * * *

In this case, Plaintiffs do not point to any inaccurate or untimely information which led to their suspensions from the program. In fact, the agency files correctly reflect their suspensions from the program. Instead, they contend that the "inaccurate" information contained in the files of the Internal Revenue Service is the agency's final determination that each is "unsuitable" for participation in the electronic filing program. Plaintiffs argue that the Privacy Act is triggered by the mere presence of disputed information in the agency's files and the Privacy Act imposes no requirement that Plaintiffs make a request that the information be corrected. The court agrees that the express language of the statute does not appear to require exhaustion of remedies under § 552a(g)(1)(C). However, in order to sustain a violation under that subsection, Plaintiffs must show that the agency "acted in a manner which was intentional or willful." 5 U.S.C. § 552a(g)(4).

Plaintiffs Mayfield and Muhammad concede that the IRS's records accurately reflected that they had not timely

filed their income tax returns in certain years. It likewise appears undisputed that the agency's records correctly reflect that the Plaintiffs have been suspended from the electronic filing program. Plaintiffs have failed to allege that the agency intentionally or willfully kept inaccurate or incomplete information which led to their suspensions from the electronic filing program.

After reviewing the Amended Complaint, the court concludes that Plaintiffs have failed to state a claim for relief under the Privacy Act because Plaintiffs fail to allege an intentional or willful action which resulted in inaccurate information being placed or maintained in their files. The Privacy act was not intended to be a vehicle to challenge a final agency decision and to thereafter obtain monetary relief simply because the agency maintained that decision in its records. The Privacy Act may not be used to collaterally attack a final agency decision as "inaccurate," or "incomplete" merely because the individual contests the decision.

Additionally, Plaintiff Compro-Tax, Inc. may not make a claim under the Privacy Act because the Act does not apply to corporations. The Privacy Act defines an "individual" as "a citizen of the United States or an alien lawfully admitted for permanent residence." As stated by the Fifth Circuit:

> The legislative history leaves no room for debate on this subject. The Senate Report indicates that Congress, by using this definition, intended to distinguish 'between the rights which are given to the citizen as an individual under this Act and the rights of proprietorships, businesses and corporations which are not intended to be

covered by this Act.' *Dresser Industries, Inc. v. United States,* 596 F.2d 1231, 1237-38 (5th Cir. 1979) (citations omitted).

Based on the foregoing, it is RECOMMENDED that all Plaintiffs' causes of action under the Privacy Act be dismissed for their failure to state a claim pursuant to Rule 12(b)(6).

D. Claims arising under the Internal Revenue Code

Plaintiffs claim jurisdiction under 26 U.S.C. § 7217 to redress conclusory allegations of unlawful disclosures of tax return information. Defendants correctly point out that Section 7217 was repealed by the Tax Equity and Fiscal Responsibility Act of 1982. The fact that the provisions of that section are now embodied in another section of the Internal Revenue Code does not allow the court to *sua sponte* amend Plaintiffs' complaint to reflect the section as recodified. As the Amended Complaint now stands, it improperly invokes jurisdiction under a repealed statute. It is RECOMMENDED that any claim under 26 U.S.C. § 7217 be DISMISSED.

If Plaintiffs intend to make a claim for unauthorized disclosure of tax return information pursuant to 26 U.S.C. §§ 6103 and 7431, they must seek leave to amend their complaint and clearly state the factual basis for such a claim. As the Amended Complaint now reads, the Defendant is not on notice as to when, where, by whom, to whom, or what information was improperly disclosed. This information must be supplied before the court will consider granting leave to amend the Amended Complaint.

E. Claims against Thelma Dennis, individually

Defendant Thelma Dennis has also moved to dismiss various actions brought against her in her official and individual capacities.

A Privacy Act claim may only be brought against the agency maintaining the challenged records. Dennis is not a proper party to Plaintiffs' Privacy Act claims. The court has recommended dismissal of Plaintiffs' Privacy Act claims. In the event that that recommendation is not adopted by the district court, it is RECOMMENDED that Defendants' Motion to Dismiss Plaintiffs' Privacy Act claim be GRANTED as to Defendant Dennis.

Similarly, the court has recommended dismissal of Plaintiffs' wrongful disclosure of tax information claims because they were brought pursuant to a repealed statute. Should Plaintiffs seek leave to amend their complaint, the court notes that Dennis would not be a proper party to any claim brought under 26 U.S.C. §§ 6103 and 7431. Pursuant to the statute, the United States of America is the proper party. *See* 26 U.S.C. § 7431(a)(1).

An action seeking judicial review of a final agency decision is typically brought against the United States or an agency of the United States. However an officer of the United States may also be named in his or her official capacity of injunctive or mandatory relief is sought. Since Plaintiffs seek injunctive relief, Defendant Dennis may remain a defendant in her official capacity as Coordinator of the Electronic Filing Program in the Houston District.

Finally, Plaintiffs sue Thelma Dennis in her individual capacity for alleged deprivations of due process and

violations of their liberty interests pursuant to the judicially created remedy for constitutional tort announced in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 396-97 (1971).

Federal employees are immune from suit as long as "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Mitchell v. Forsyth*, 472 U.S. 511, 517 (1985) (internal quotations omitted). Officials sued for constitutional violations "do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision." *Davis v. Scherer*, 468 U.S. 183, 197 (1984). Unless the plaintiffs' allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery. *Mitchell*, 472 U.S. at 525-26, (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 817-19 (1982)).

Dennis has raised the defense of qualified immunity for her actions. Although the parties have addressed in a peripheral way the issue of qualified immunity, Thelma Dennis has not directly raised this issue in a dipositive motion. This court has subject matter jurisdiction to hear a *Bivens* claim against Dennis.

IV.

In conclusion, it is RECOMMENDED that the court find that it has jurisdiction on: (1) all Plaintiffs' constitutional claims for declaratory and injunctive relief; (2) Plaintiffs Mayfield, Muhammad, and Rhodes' claims under the Administrative Procedures Act; and (3) all

Plaintiffs' constitutional claims against Defendant Dennis.

It is RECOMMENDED that the court DISMISS: (1) all Plaintiffs' monetary claims for relief under the U.S. Constitution, the Administrative Procedures Act, the Privacy Act, and the Internal Revenue Code, 26 U.S.C. § 7217; (2) Plaintiff Compro-Tax, Inc.'s claim for relief under the Administrative Procedures Act; and (3) Plaintiff Compro-Tax, Inc.'s claim for relief under the Privacy Act.

After the district court considers this Memorandum and the parties' objections, the court will hold a discovery conference to determine on what claims the Plaintiffs are entitled to discovery, and to set a briefing schedule for the court's consideration of the constitutional issues, the court's review of the challenged agency decision under the APA, and the qualified immunity issue.

The Clerk shall send copies of this Memorandum and Recommendation to the respective parties who have ten (10) days from the receipt thereof to file written objections thereto pursuant to General Order 80-5. Failure to file written objections within the time period mentioned shall bar an aggrieved party from attacking the factual findings and legal conclusions on appeal.

The original of any written objections shall be filed with the United States District Clerk, P. O. Box 61010, Houston, Texas 77208. Copies of such objections shall be mailed to opposing parties and to the chambers of the undersigned, 515 Rusk, Suite 7019, Houston, Texas 77002.

DONE in Houston, Texas, this 8th day of April, 1999.

/s/ Nancy K. Johnson
NANCY K. JOHNSON
UNITED STATES
MAGISTRATE JUDGE

DEPARTMENT OF THE TREASURY
OFFICE OF DIRECTOR OF PRACTICE
WASHINGTON, D.C.

IN THE MATTER OF:

| | |
|---|---|
| Jackie E. Mayfield | ) |
| d/b/a Jackie E. Mayfield | ) DECISION ON |
| Appellant | ) APPEAL |

This matter is before the Office of Director of Practice for decision on appeal from the suspension of Jackie E. Mayfield d/b/a Jackie E. Mayfield (Appellant) to participate in the Internal Revenue Service Electronic Filing Program as a preparer of individual income tax returns.

Revenue Procedure 96-61 prescribes the eligibility requirements, standards of conduct, the scope of authority and the circumstances and conditions under which an Electronic Filer may exercise the privilege of Electronically Filing 1996 Federal income tax returns (Forms 1040). Pursuant to section 13 of the Revenue Procedure, the Service reserves the right to rescind the Electronic Filing Privilege of any Electronic Filer who violates any provision of this revenue procedure or who does not consistently transmit accurate returns.

Among the reasons for which a participant may be suspended from the Electronic Filing Program is for failure to file a timely tax return.

Section 15 of the Revenue Procedure provides that requests for administrative review of suspension decisions may be submitted to the Office of Director of Practice for decision. Such decision will be final.

By a letter dated July 24, 1997 and supplemented by letter dated December 15, 1997 the Director, Houston District of the Internal Revenue Service, notified Appellant his participation in the Electronic Filing Program was being suspended. The Director's determination was based on the fact that among other reasons, Appellant failed to timely file Form 1040 for 1995.

A request for administrative review to the Director of Practice was made by Appellant in August of 1997 and January 15, 1998. In support of such request, Appellant admits that Form 1040 for 1995 was not timely filed. The Appellant states that the failure to file was due to computer and personal problems.

Information provided by the Houston District confirms that Appellant failed to timely file Form 1040 for 1995. The Appellant has not demonstrated any reasonable cause for the failure to file timely tax returns. Based on the above, the basis for the suspension is consistent with the provisions of the Revenue Procedure. Such basis has not been overcome by the Appellant.

As an example to the taxpaying public, implicit trust must be placed on Electronic Filers to possess a high degree of integrity as well as compliance with the Revenue Procedure. f[sic]ailure to timely file a business or personal tax return does not reflect the degree of compliance which the Electronic Filing Program has established and constitutes a failure to satisfy the minimum requirements necessary for participation in the Electronic Filing Program.

Accordingly, the decision of the Director, Houston District of the Internal Revenue Service, to suspend participation of the appellant in the Electronic Filing Program is hereby sustained.

APR 01 1998
Date

/s/ [Illegible]
For Robert I. Brauer
Director of Practice

Department of the Treasury
Internal Revenue Service

District
Director

CONFIDENTIAL EFIN: 760471

Jackie E. Mayfield
PO Box 1548
Orange, TX 77630

Dear Mr. Mayfield:

We have carefully considered the additional information you provided in your appeal letter. The facts and circumstances stated in our letter proposing to suspend you continue to support our decision to deny your participation in the Electronic Filing (ELF) Program.

The period of the suspension includes the remainder of this calendar year plus the next two calendar years. During this time, you must fulfill all past tax requirements and remain in compliance to be eligible for acceptance into the ELF Program. A new application for participation into the ELF program may be submitted for the application period immediately preceding the end of the suspension.

You have the right to appeal this decision to the Director of Practice. Your written appeal must contain a detailed explanation, with supporting documentation, of why the denial should be reversed. In addition, you must include a copy of your Form 8633 and a copy of each denial letter.

Please mail your appeal to: Internal Revenue Service
Director of Practice
Attention:
Houston DOEFC
8701 S. Gessner,
Mall Stop 6401 HAL
Houston, Texas 77074

Failure to appeal within 30 calendar days of the date of this letter irrevocably terminates your right to an appeal. If we can be of assistance, please contact Thelma Dennis, District Office Electronic Filing Coordinator (DOEFC), at (281) 721-7435.

Sincerely,

/s/ James J. Walsh
James J. Walsh
District Director

Department of the Treasury
Internal Revenue Service

District
Director

CONFIDENTIAL EFIN: 760471

Jackie E. Mayfield
PO Box 1548
Orange, TX 77630

Dear Mr. Mayfield:

The Houston District is conducting an annual suitability review of all electronic filing participants for processing year 1998. This letter is to notify you that we are proposing to suspend you from participating in the Electronic Filing Program.

The reason for the suspension is that you have failed to comply with Section 4.19(2) of the Revenue Procedure 96-61, Obligation of Participants in the Electronic Filing Program for Form 1040, U.S. Individual Income Tax Return. We have no record of receiving your U.S. Individual Income Tax Return for the 1995 tax year.

You have the right to appeal this decision within 30 days of the date of this letter. During this process, the denial to participate in the program remains in effect.

Your written appeal must contain a detailed explanation showing reasonable cause for the item(s) specified above. Any documentation supporting your reasonable cause should also be provided.

Please mail your appeal to: Internal Revenue Service
Attention:
Houston DOEFC
8701 S. Gessner,
Mall Stop 6401HAL
Houston, Texas 77074

Failure to appeal within 30 calendar days of the date of this proposed letter irrevocably terminates your right to an appeal. If we can be of assistance, please contact Thelma Dennis, District Office Electronic Filing Coordinator (DOEFC), or James Madock at (281) 721-7435.

Sincerely,

/s/ James Walsh
James J. Walsh
District Director

DEPARTMENT OF THE TREASURY
OFFICE OF DIRECTOR OF PRACTICE
WASHINGTON, D.C.

IN THE MATTER OF:

| | |
|---|---|
| Yusuf A. Muhammad | ) |
| d/b/a Yusuf A. Muhammad | ) DECISION ON |
| Appellant | ) APPEAL |

This matter is before the Office of Director of Practice for decision on appeal from the suspension of Yusuf A. Muhammad d/b/a Yusuf A. Muhammad (Appellant) to participate in the Internal Revenue Service Electronic Filing Program as a preparer of individual income tax returns.

Revenue Procedure 96-61 prescribes the eligibility requirements, standards of conduct, the scope of authority and the circumstances and conditions under which an Electronic Filer may exercise the privilege of Electronically Filing 1995 Federal income tax returns (Forms 1040). Pursuant to section 13 of the Revenue Procedure, the Service reserves the right to rescind the Electronic Filing Privilege of any Electronic Filer who violates any provision of this revenue procedure or who does not consistently transmit accurate returns.

Among the reasons for which a participant may be suspended from the Electronic Filing Program is for failure to file a timely tax return.

Section 15 of the Revenue Procedure provides that requests for administrative review of suspension decisions may be submitted to the Office of Director of Practice for decision. Such decision will be final.

By a letter dated July 24, 1997 and supplemented by letter dated November 10, 1997 the Director, Houston District of the Internal Revenue Service, notified Appellant his participation in the Electronic Filing Program was being suspended. The Director's determination was based on the fact that among other reasons, Appellant failed to timely file Form 1040 for 1995.

A request for administrative review to the Director of Practice was made by Appellant. In support of such request, Appellant admits that Form 1040 1995 was not timely filed. The Appellant states that the failure to file was due to computer and personal problems.

Information provided by the Houston District confirms that Appellant failed to timely file Form 1040 for 1994 and 1995. The Appellant has not demonstrated any reasonable cause for the failure to file timely tax returns. Based on the above, the basis for the suspension is consistent with the provisions of the Revenue Procedure. Such basis has not been overcome by the Appellant.

As an example to the taxpaying public, implicit trust must be placed on Electronic Filers to possess a high degree of integrity as well as compliance with the Revenue Procedure. f[sic]ailure to timely file a business or personal tax return does not reflect the degree of compliance which the Electronic Filing Program has established and constitutes a failure to satisfy the minimum requirements necessary for participation in the Electronic Filing Program.

Accordingly, the decision of the Director, Houston District of the Internal Revenue Service, to suspend participation of the Appellant in the Electronic Filing Program is hereby sustained.

JAN 27 1998
Date

/s/ [Illegible]
For Robert I. Brauer
Director of Practice

Department of the Treasury
Internal Revenue Service

District
Director

CONFIDENTIAL
Yusuf A. Muhammad
PO Box 1989
Beaumont, Texas 77704-1989

Dear Mr. Muhammad:

We received your appeal and reason(s) for non-receipt of your Form 1040, U.S. Individual Income Tax Return, for the 1995 tax year. The reason stated is that you made a mistake by not properly prioritizing the filing of your 1995 return. Also, you stated that you experienced a hard disk crash that caused records to be reconstructured by hand. The reasons stated do not establish reasonable cause.

The law allows you to file for a second extension for additional time to file, but you failed to do so for tax years 1994 and 1995, resulting in untimely filed tax returns. An inquiry on the 1994 and 1995 delinquent returns was sent to you in May 1997. The 1995 return was not received until July 31, 1997. The length of time between the events cited as reasons and the filing date of the return, negates the impact of the reasons cited for the untimely filed return.

The decision to suspend you from participating in the Electronic Filing (ELF) Program is sustained. The period of the suspension includes the remainder of this calendar year plus the next two calendar years. During this time, you must fulfill all past tax requirements and remain in

compliance to be eligible for acceptance into the ELF Program. A new application for participation into the ELF program may be submitted for the application period immediately preceding the end of the suspension.

You have the right to appeal this decision to the Director of Practice. Your written appeal must contain a detailed explanation with supporting documentation, of why the denial should be reversed. In addition, you must include a copy of your Form 8633 and a copy of each denial letter.

Please mail your appeal to: Internal Revenue Service
Director of Practice
Attention:
Houston DOEFC
8701 S. Gassner, Mail Stop
6401 HAL
Houston, Texas 77074

Failure to appeal within 30 calendar days of the date of this letter irrevocably terminates your right to an appeal. If we can be of assistance, please contact Thelma Dennis, District Office Electronic Filing Coordinator (DOEFC), at (281) 721-7435.

Sincerely,

/s/ Glen E. Hudson
for James J. Walsh
District Director

Department of the Treasury
Internal Revenue Service

District
Director

CONFIDENTIAL EFIN: 760055

Yusuf A. Muhammad
PO Box 1989
Beaumont Texas 77704-1989

Dear Mr. Muhammad

The Houston District is conducting an annual suitability review of all electronic filing participants for processing year 1998. This letter is to notify you that we are proposing to suspend you from participating in the Electronic Filing Program.

The reason for the suspension is that you have failed to comply with Section 4.19(2) of the Revenue Procedure 96-61. Obligation of Participants in the Electronic Filing Program for Form 1040, U.S. Individual Income Tax Return. We have no record of receiving your U.S. Individual Income Tax Return for the 1995 tax year.

You have the right to appeal this decision within 30 days of the date of this letter. During this process, the denial to participate in the program remains in effect.

Your written appeal must contain a detailed explanation showing reasonable cause for the item(s) specified above. Any documentation supporting your reasonable cause should also be provided.

Please mail your appeal to:

Internal Revenue Service
Attention: Houston DOEFC
8701 S. Gessner, Mail Stop 6401HAL
Houston, Texas 77074

Failure to appeal within 30 calendar days of the date of this proposed letter irrevocably terminates your right to an appeal. If we can be of assistance, please contact Thelma Dennis, District Office Electronic Filing Coordinator (DOEFC), or James Matlock at (281) 721-7435.

Sincerely,

/s/ [Illegible]
James J. Walsh
District Director

Department of the Treasury
Internal Revenue Service

District
Director

CONFIDENTIAL EFIN: 764847

Inga Rhodes
1502 W Park Ave
Orange, Texas 77630

Dear Ms. Rhodes:

We have carefully considered the additional information you provide in your appeal letter. The facts and circumstances stated in our letter proposing to suspend you continue to support our decision to deny your participation in the Electronic Filing (ELF) Program.

The period of the suspension includes the remainder of this calendar year plus the next two calendar years. A new application for participation into the ELF program may be submitted for the application period immediately preceding the end of the suspension.

You have the right to appeal this decision to the Director of Practice. Your written appeal must contain a detailed explanation with supporting documentation on why the denial should be reversed. In addition, you must include a copy of your Form 8633 and a copy of each denial letter.

Please mail your appeal to:

Internal Revenue Service
Director of Practice
Attention: Houston DOETA
8701 S. Gessner, Mail Stop 6401HAL
Houston, Texas 77074

Failure to appeal within 30 calendar days of the date of this letter irrevocably terminates your right to an appeal. If we can be of assistance, please contact Thelma Dennis, Houston District Electronic Tax Administration (ETA) Coordinator, at (281) 721-7435.

Sincerely,

/s/ James Walsh
James J. Walsh
District Director

Department of the Treasury
Internal Revenue Service

District
Director

CONFIDENTIAL EFIN: 764847

Inga Rhodes
1502 W Park Ave
Orange, Texas 77630

Dear Ms. Rhodes:

We are suspending you from participating in the Electronic I [illegible] Section 4.19(12) of Revenue Procedure 97-60. Requirements [illegible] Electronic Filing Program for Form 1040, U.S. Individual Income [illegible] a business relationship with a suspended electronic filer. Your association with Jackie Mayfield, a suspended electronic filer, has resulted in your suspension.

The period of the suspension includes the remainder of this calendar year plus the next two calendar years. A new application for participation into the ELF program may be submitted for the application period immediately preceding the end of the suspension.

You have the right to appeal this decision within 30 days of the date of this letter. During this process, the denial to participate in the program remains in effect. Your written appeal must contain a detailed explanation showing reasonable cause for the item specified above. Any documentation supporting your reasonable cause should also be provided.

Please mail your appeal to:

Internal Revenue Service
Attention: Houston DOEFC
8701 S. Gessner, Mail Stop 6401HAL
Houston, Texas 77074

Failure to appeal within 30 calendar days of the date of this letter irrevocably terminates your right to an appeal. If we can be of assistance, please contact Thelma Dennis, Houston District Electronic Tax Administration (ETA) Coordinator, at (281) 721-7435.

Sincerely,

/s/ [Illegible]
James J. Walsh
District Director

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 00-20604

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COMPRO-TAX INC;
JACKIE E MAYFIELD;
YUSUF A MUHAMMAD; INGA RHODES

Plaintiffs – Appellants

v.

INTERNAL REVENUE SERVICE;
THELMA DENNIS;
UNITED STATES OF AMERICA

Defendants – Appellees

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Appeal from the United States District Court
for the Southern District of Texas, Houston

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ON PETITION FOR REHEARING AND
REHEARING EN BANC

(Filed Nov. 9, 2001)

(Opinion 09/07/01, 5 Cir., _____, _____ F.3d _____)

Before HIGGINBOTHAM, BARKSDALE, and STEWART, Circuit Judges.

PER CURIAM:

(X) The petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on

Rehearing En Banc. (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Carl E. Stewart
United States Circuit Judge

**5 U.S.C. § 701. Application; definitions**

(a) This chapter applies, according to the provisions thereof, except to the extent that –

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter –

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include –

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 if title 12; chapter 2 of title 41; subchapter II of chapter 471 of title 49; or sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

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**5 U.S.C. § 702. Right of review**

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

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**5 U.S.C. § 703. Form and venue of proceeding**

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

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**5 U.S.C. § 704. Actions reviewable**

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that

the action meanwhile is inoperative, for an appeal to superior agency authority.

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**5 U.S.C. § 705. Relief pending review**

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

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**5 U.S.C. § 706. Scope of review**

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court, shall –

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be –

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Rev. Proc. 96-61

Internal Revenue Service (I.R.S.)

Revenue Procedure

1997 ELECTRONIC FILING PROGRAM; FORM 1040

Published: December 30, 1996

* * *

SECTION 1. PURPOSE

This revenue procedure informs those who participate in the 1997 Electronic Filing Program for Form 1040 and Form 1040A, U.S. Individual Income Tax Return, and Form 1040EZ, Income Tax Return for Single and Joint Filers With No Dependents, of their obligations to the Internal Revenue Service, taxpayers, and other participants. This revenue procedure updates *Rev. Proc. 95-49, 1995-2 C.B. 419.*

SECTION 2. BACKGROUND AND CHANGES

* * *

.08 This revenue procedure updates *Rev. Proc. 95-49,* which applied to the Electronic Filing Program for the 1996 filing season. The updates include changes in the Electronic Filing Program for the 1997 filing season, clarifications of prior Electronic Filing Program statements, and additional guidance derived from other Service documents that relate to the Electronic Filing Program.

* * *

SECTION 4. ACCEPTANCE IN THE ELECTRONIC FILING PROGRAM

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.19 The following reasons, which apply to any firm, organization, Principal, or Responsible Official listed on Form 8633, may result in the rejection of an application to participate in the 1997 Electronic Filing Program (this list is not all-inclusive):

(1) conviction of any criminal offense under the revenue laws of the United States, or of any offense involving dishonesty or breach of trust;

(2) failure to file timely and accurate tax returns, including returns indicating that no tax is due;

(3) failure to timely pay any tax liabilities;

(4) assessment of tax penalties;

(5) suspension/disbarment from practice before the Service;

(6) other facts or conduct of a disreputable nature that would reflect adversely on the Electronic Filing Program;

(7) misrepresentation on an application;

(8) suspension or rejection from the program in a prior year;

(9) unethical practices in return preparation;

(10) stockpiling returns prior to official acceptance into the Electronic Filing Program (see section 5.14 of this revenue procedure);

(11) knowingly and directly or indirectly employing or accepting assistance from any firm, organization, or individual that is prohibited from applying to participate in the Electronic Filing Program (see section 13.10 of this revenue procedure) or that is suspended from participating in the Electronic Filing Program (see section 13.11 of this revenue procedure). This includes any individual whose actions resulted in the rejection or suspension of a corporation or a partnership from the Electronic Filing Program; or

(12) knowingly and directly or indirectly accepting employment as an associate, correspondent, or as a subagent from, or sharing fees with, any firm, organization, or individual that is prohibited from applying to participate in the Electronic Filing Program (see section 13.10 of this revenue procedure) or that is suspended from participating in the Electronic Filing Program (see section 13.11 of this revenue procedure). This includes any individual whose actions resulted in the rejection or suspension of a corporation or a partnership from the Electronic Filing Program.

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SECTION 13. MONITORING AND SUSPENSION OF AN ELECTRONIC FILER

.01 The Service will monitor an Electronic Filer for conformity with this revenue procedure. The Service can immediately suspend, without notice, an Electronic Filer

from the Electronic Filing Program. However, in most circumstances, a suspension from participation in the Electronic Filing Program is effective as of the date of the letter informing the Electronic Filer of the suspension. Before suspending an Electronic Filer, the Service may issue a warning letter that describes specific corrective action for deviations from this revenue procedure.

* * *

.07 The Service reserves the right to suspend the electronic filing privilege of any Electronic Filer that violates any provision of this revenue procedure. Generally, the Service will advise a suspended Electronic Filer concerning the requirements for reacceptance into the Electronic Filing Program. The following reasons may lead to a warning letter and/or suspension of an Electronic Filer from the Electronic Filing Program (this list is not all-inclusive):

(1) the reasons listed in section 4.19 of this revenue procedure;

* * *

.10 If an application for participation in the Electronic Filing Program is denied, the applicant is ineligible to submit a new application for two years from the application date of the denied application.

.11 If an Electronic Filer is suspended from participating in the Electronic Filing Program, the period of suspension includes the remainder of the calendar year in which the suspension occurs plus the next two calendar

years. A suspended participant may submit a new application for the application period immediately preceding the end of the suspension.

* * *

SECTION 14. ADMINISTRATIVE REVIEW PROCESS FOR DENIAL OF PARTICIPATION IN THE ELECTRONIC FILING PROGRAM

.01 An applicant that has been denied participation in the Electronic Filing Program has the right to an administrative review. During the administrative review process, the denial of participation remains in effect.

.02 In response to the submission of a Form 8633, the appropriate district office will either (1) accept an applicant into the Electronic Filing Program, or (2) issue a proposed letter of denial that explains to the applicant why the district office proposes to reject the application to participate in the Electronic Filing Program.

.03 An applicant that receives a proposed letter of denial may mail or deliver, within 30 calendar days of the date of the proposed letter of denial, a written response to the district office that issued the proposed letter of denial. The applicant's response must address the district office's explanation for proposing the denial to participate.

.04 Upon receipt of an applicant's written response, the district office will reconsider its proposed letter of denial. The district office may (1) withdraw its proposed letter of denial and admit the applicant into the Electronic Filing Program, or (2) finalize its proposed letter of denial and issue it to the applicant.

.05 If an applicant receives a final letter from the district office that denies the applicant participation in the Electronic Filing Program, the applicant is entitled to an appeal, in writing, to the Director of Practice.

.06 The appeal must be mailed or delivered to the district office that issued the denial letter within 30 calendar days of the date of the denial letter. An applicant's written appeal must contain a detailed explanation, with supporting documentation, of why the denial should be reversed. In addition, the applicant must include a copy of the applicant's Form 8633 and a copy of the denial letter.

.07 The district office whose denial is being appealed will, upon receipt of a written appeal to the Director of Practice, forward to the Director of Practice its file on the applicant and the material described in section 14.06 of this revenue procedure that the applicant has submitted to the district office. The district office will forward to the Director of Practice these materials within 15 calendar days of receipt of the applicant's written appeal to the Director of Practice.

.08 Failure to respond within the 30-day periods described in sections 14.03 and 14.06 of this revenue procedure irrevocably terminates an applicant's right to an administrative review or appeal.

## SECTION 15. ADMINISTRATIVE REVIEW PROCESS FOR SUSPENSION FROM THE ELECTRONIC FILING PROGRAM

.01 An Electronic Filer that has been suspended from participation in the Electronic Filing Program has the

right to an administrative review. During the administrative review process, the suspension remains in effect.

.02 If an Electronic Filer receives a proposed suspension letter, the Electronic Filer may mail or deliver, within 30 calendar days of the date of the proposed suspension letter, a detailed written explanation, with supporting documentation, of why the proposed suspension letter should be withdrawn. This written response should be sent to the district office or service center that issued the proposed suspension letter.

.03 Upon receipt of the Electronic Filer's written response, the district office or service center will reconsider its proposed suspension of the Electronic Filer. The district office or service center will either withdraw its proposed suspension letter and reinstate the Electronic Filer or issue a suspension letter to the Electronic Filer.

.04 If an Electronic Filer receives a suspension letter from a district office or a service center, the Electronic Filer is entitled to an appeal, in writing, to the Director of Practice.

.05 The appeal must be mailed or delivered to the district office or service center that issued the suspension letter within 30 calendar days of the date of the suspension letter. The Electronic Filer's written appeal must contain detailed reasons, with supporting documentation, for reversal of the suspension. In addition, the Electronic Filer must include a copy of its Form 8633 and a copy of the suspension letter.

.06 The district office or service center whose decision to suspend is being appealed will, upon receipt of a

written appeal to the Director of Practice, forward to the Director of Practice its file on the Electronic Filer and the material described in section 15.05 of this revenue procedure that the Electronic Filer has submitted to the district office or the service center. The district office or the service center will forward to the Director of Practice these materials within 15 calendar days of the receipt of the Electronic Filer's written request for appeal to the Director of Practice.

.07 Failure to appeal within the 30-day period described in section 15.05 of this revenue procedure irrevocably terminates an Electronic Filer's right to an appeal.

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SECTION 19. EFFECTIVE DATE

This revenue procedure is effective December 30, 1996.

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Rev. Proc. 95-49

Internal Revenue Service (I.R.S.)

Revenue Procedure

ELECTRONIC FILING PROGRAM; FORM 1040

Published: December 11, 1995

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SECTION 1. PURPOSE

This revenue procedure informs those who participate in the 1996 Electronic Filing Program for Form 1040 and Form 1040A, U.S. Individual Income Tax Return, and Form 1040EZ, Income Tax Return for Single and Joint Filers With No Dependents, of their obligations to the Internal Revenue Service, taxpayers, and other participants. This *revenue procedure updates Rev. Proc. 94-63, 1994-2 C.B. 785.*

SECTION 2. BACKGROUND AND CHANGES

* * *

.08 This *revenue procedure updates Rev. Proc. 94-63,* which applied to the Electronic Filing Program for the 1995 filing season. The updates include changes in the Electronic Filing Program for the 1996 filing season, clarifications of prior Electronic Filing Program statements, and additional guidance derived from other Service documents that relate to the Electronic Filing Program.

* * *

SECTION 4. ACCEPTANCE IN THE ELECTRONIC FILING PROGRAM

* * *

.14 The following reasons may result in the rejection of an application to participate in the 1996 Electronic Filing Program (this list is not all-inclusive):

(1) conviction of any criminal offense under the revenue laws of the United States, or of any offense involving dishonesty or breach of trust;

(2) failure to file timely and accurate business or personal tax returns;

(3) failure to timely pay any personal or business tax liabilities;

(4) assessment of penalties;

(5) suspension/disbarment from practice before the Service;

(6) other facts or conduct of a disreputable nature that would reflect adversely on the Electronic Filing Program;

(7) misrepresentation on an application;

(8) suspension or rejection from the program in a prior year;

(9) unethical practices in return preparation;

(10) stockpiling returns prior to official acceptance into the Electronic Filing Program (see section 5.15);

(11) knowingly and directly or indirectly employing or accepting assistance from any person who has been

denied acceptance into the Electronic Filing Program or is suspended from the Electronic Filing Program. This includes any individual whose actions resulted in the rejection or suspension of a corporation or a partnership from the Electronic Filing Program; or,

(12) knowingly and directly or indirectly accepting employment as an associate, correspondent, or as a sub-agent from, or sharing fees with, any person who has been denied acceptance into the Electronic Filing Program or is suspended from the Electronic Filing Program. This includes any individual whose actions resulted in the rejection or suspension of a corporation or a partnership from the Electronic Filing Program.

* * *

SECTION 13. MONITORING AND SUSPENSION OF AN ELECTRONIC FILER

.01 The Service will monitor an Electronic Filer for conformity with this revenue procedure. The Service can immediately suspend, without notice, an Electronic Filer from the Electronic Filing Program. However, in most circumstances, a suspension from participation in the Electronic Filing Program is effective as of the date of the letter informing the Electronic Filer of the suspension. Before suspending an Electronic Filer, the Service may issue a warning letter that describes specific corrective action for deviations from this revenue procedure.

* * *

.07 The Service reserves the right to suspend the electronic filing privilege of any Electronic Filer that violates any provision of this revenue procedure. Generally, the Service will advise a suspended Electronic Filer concerning the requirements for reacceptance into the Electronic Filing Program. The following reasons may lead to a warning letter and/or suspension of an Electronic Filer from the Electronic Filing Program (this list is not all-inclusive):

(1) the reasons listed in section 4.14 of this revenue procedure;

* * *

.10 Denials of applications and suspensions of participation in the Electronic Filing Program will result in:

(1) a rejected applicant not being reconsidered for participation in the Electronic Filing Program for at least two years; and

(2) a suspended Electronic Filer not being reconsidered for participation in the Electronic Filing Program for at least two years.

For the purposes of this section 13.10, two years means the remaining months in the calendar year of denial of participation or suspension and the following two calendar years.

SECTION 14. ADMINISTRATIVE REVIEW PROCESS FOR DENIAL OF PARTICIPATION IN THE ELECTRONIC FILING PROGRAM

.01 An applicant who has been denied participation in the Electronic Filing Program has the right to an

administrative review. During the administrative review process, the denial of participation remains in effect.

.02 In response to the submission of a Form 8633, the appropriate district office will either (1) accept an applicant into the Electronic Filing Program, or (2) issue a proposed letter of denial that explains to the applicant why the district office proposes to reject the application to participate in the Electronic Filing Program.

.03 An applicant that receives a proposed letter of denial may respond, in writing, to the district office that issues the proposed letter of denial. The applicant's response must address the district office's explanation for proposing the denial to participate. The district office must receive the applicant's response within 30 calendar days of the date of the proposed letter of denial.

.04 Upon receipt of an applicant's written response, the district office will reconsider its proposed letter of denial. The district office may (1) withdraw its proposed letter of denial and admit the applicant into the Electronic Filing Program, or (2) finalize its proposed letter of denial and issue it to the applicant.

.05 If an applicant receives a final letter from the district office that denies the applicant participation in the Electronic Filing Program, the applicant is entitled to an appeal, in writing, to the Director of Practice.

.06 The appeal must be filed with the district office that issued the denial letter within 30 calendar days of the date of the denial letter. An applicant's written appeal must contain a detailed explanation, with supporting documentation, of why the denial should be reversed. In

addition, the applicant must include a copy of the applicant's Form 8633 and a copy of the denial letter.

.07 The district office whose denial is being appealed will, upon receipt of a written appeal to the Director of Practice, forward to the Director of Practice its file on the applicant and the material described in section 14.06 of this revenue procedure that the applicant has submitted to the district office. The district office will forward to the Director of Practice these materials within 15 calendar days of receipt of the applicant's appeal to the Director of Practice.

.08 Failure to respond within the 30-day periods described in sections 14.03 and 14.06 of this revenue procedure irrevocably terminates an applicant's right to an administrative review or appeal.

SECTION 15. ADMINISTRATIVE REVIEW PROCESS FOR SUSPENSION FROM THE ELECTRONIC FILING PROGRAM

.01 An Electronic Filer who has been suspended from participation in the Electronic Filing Program has the right to an administrative review. During the administrative review process, the suspension remains in effect.

.02 If an Electronic Filer receives a proposed suspension letter from a district office or service center, the Electronic Filer may submit a detailed written explanation, with supporting documentation, of why the proposed suspension letter should be withdrawn. The Electronic Filer must ensure that the district office or service center that issued the proposed suspension letter receives the Electronic Filer's written response within 30

calendar days of the date of the proposed suspension letter.

.03 Upon receipt of the Electronic Filer's written response, the district office or service center will reconsider its proposed suspension of the Electronic Filer. The district office or service center will either withdraw its proposed suspension letter and reinstate the Electronic Filer or finalize the suspension letter and issue it to the Electronic Filer.

.04 If an Electronic Filer receives a suspension letter from a district office or a service center, the Electronic Filer is entitled to an appeal, in writing, to the Director of Practice.

.05 The Electronic Filer must ensure that the district office or service center that issued the suspension letter receives the Electronic Filers's written appeal for review by the Director of Practice within 30 calendar days of the date of the suspension letter. The Electronic Filer's written appeal for review must contain detailed reasons, with supporting documentation, for reversal of the suspension. In addition, the Electronic Filer must include a copy of its Form 8633 and a copy of the suspension letter.

.06 The district office or service center whose decision to suspend is being appealed will, upon receipt of a written appeal to the Director of Practice, forward to the Director of Practice its file on the Electronic Filer and the material described in section 15.05 of this revenue procedure that the Electronic Filer has submitted to the district office or the service center. The district office or the service center will forward to the Director of Practice

these materials within 15 calendar days of the receipt of an Electronic Filer's written request for appeal.

.07 Failure to appeal within the 30-day period described in section 15.05 of this revenue procedure irrevocably terminates an Electronic Filer's right to an appeal.

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SECTION 19. EFFECTIVE DATE

This revenue procedure is effective November 22, 1995.

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**Rev. Proc. 94-63**

Internal Revenue Service (I.R.S.)

Revenue Procedure

Published: September 20, 1994

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SECTION 1. PURPOSE

This revenue procedure informs those who participate in the 1995 Electronic Filing Program for Form 1040 and Form 1040A, U.S. Individual Income Tax Return, and Form 1040EZ, Income Tax Return for Single and Joint Filers With No Dependents, of their obligations to the Internal Revenue Service, taxpayers, and other participants. *This revenue procedure updates Rev. Proc. 94-11, 1994-2 I.R.B. 27.*

SEC. 2. BACKGROUND AND CHANGES

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.07 This revenue procedure reflects changes in the Electronic Filing Program for the 1995 filing season.

* * *

SEC. 4. ACCEPTANCE IN THE ELECTRONIC FILING PROGRAM

* * *

.12 The following reasons may result in the rejection of an application to participate in the 1995 Electronic Filing Program (this list is not all-inclusive):

(1) conviction of any criminal offense under the revenue laws of the United States, or of any offense involving dishonesty or breach of trust;

(2) failure to file timely and accurate business or personal tax returns –

(3) failure to timely pay personal or business tax liabilities;

(4) assessment of penalties;

(5) suspension/disbarment from practice before the Service;

(6) other facts or conduct of a disreputable nature that would reflect adversely on the Electronic Filing Program;

(7) misrepresentation on an application;

(8) suspension or rejection from the program in a prior year;

(9) unethical – practices in return preparation;

(10) stockpiling returns prior to official acceptance into the Electronic Filing Program (see section 5.06);

(11) knowingly and directly or indirectly employing or accepting assistance from any person who has been denied acceptance into the Electronic Filing Program or is suspended from the Electronic Filing Program. (This includes any individual whose actions resulted in the rejection or suspension of a corporation or a partnership from the Electronic Filing Program); or

(12) knowingly and directly or indirectly accepting employment as an associate, correspondent, or as a sub-agent from, or sharing fees with, any person who has been denied acceptance into the Electronic Filing Program or is suspended from the Electronic Filing Program. (This includes any individual whose actions resulted in the rejection or suspension of a corporation or a partnership from the Electronic Filing Program).

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SEC. 13. MONITORING AND SUSPENSION OF AN ELECTRONIC FILER

.01 The Service will monitor an Electronic Filer for conformity with this revenue procedure. The Service can immediately suspend, without notice, an Electronic Filer from the Electronic Filing Program. However, in most circumstances, a suspension from participation in the Electronic Filing Program is effective as of the date of the letter informing the Electronic Filer of the suspension. Before suspending an Electronic Filer, the Service may issue a warning letter that describes specific corrective action for deviations from this revenue procedure.

* * *

.06 The Service reserves the right to suspend the electronic filing privilege of any Electronic Filer who violates any provision of this revenue procedure. Generally, the Service will advise a suspended Electronic Filer concerning the requirements for reacceptance into the Electronic Filing Program. The following reasons may

lead to a warning letter and/or suspension of an Electronic Filer from the Electronic Filing Program (this list is not all-inclusive):

(1) the reasons listed in section 4.12;

* * *

.08 A district director may warn Electronic Filers who are using the services of a rejected or a suspended Electronic Filer that section 4.12(11) and (12) of this revenue procedure prohibits a business relationship with a rejected or a suspended Electronic Filer. However, in appropriate circumstances, the Service may immediately suspend the Electronic Filer.

.09 Most denials and suspensions of participation in the Electronic Filing Program will result in at least a two-year period during which the Service will not consider any request to participate in the Electronic Filing Program.

SEC. 14. ADMINISTRATIVE REVIEW PROCESS FOR DENIAL OF PARTICIPATION IN THE ELECTRONIC FILING PROGRAM

.01 An applicant who has been denied participation in the Electronic Filing Program has the right to an administrative review. During the administrative review process, the denial of participation remains in effect.

.02 In response to the submission of a Form 8633, the appropriate district office will either (1) accept an applicant into the Electronic Filing Program, or (2) issue a proposed letter of denial that explains to the applicant why the district office proposes to reject the application to participate in the Electronic Filing Program.

.03 An applicant who receives a proposed letter of denial may respond in writing, to the district office that issued the proposed letter of denial. The applicant's response must address the district office's explanation for proposing the denial to participate. The district office must receive the applicant's response within 30 calendar days of the date of the proposed letter of denial.

.04 Upon receipt of an applicant's written response, the district office will reconsider its proposed letter of denial. The district office may (1) withdraw its proposed letter of denial and admit the applicant into the Electronic Filing Program, or (2) finalize its proposed letter of denial and issue it to the applicant.

.05 If an applicant receives a final letter from the district office that denies the applicant participation in the Electronic Filing Program, the applicant is entitled to an appeal, in writing, to the Director of Practice.

.06 The appeal must be filed with the district office that issued the denial letter within 30 calendar days of the date of the denial letter. An applicant's written appeal must contain a detailed explanation, with supporting documentation, of why the denial should be reversed. In addition, the applicant must include a copy of the applicant's Form 8633 and a copy of the denial letter.

.07 The district office whose denial is being appealed will, upon receipt of a written appeal to the Director of Practice, forward to the Director of Practice its file on the applicant and the material described-in-section 14.06 that the applicant has submitted to the district office. The district office will forward to the Director of Practice

these materials within 15 calendar days of receipt of the applicant's appeal to the Director of Practice.

.08 Failure to respond within the 30-day periods described in subsections .03 and .06 irrevocably terminates an applicant's right to an administrative review or appeal.

SEC. 15. ADMINISTRATIVE REVIEW PROCESS FOR SUSPENSION FROM THE ELECTRONIC FILING PROGRAM

.01 An Electronic Filer who has been suspended from participation in the Electronic Filing Program has the right to an administrative review. During the administrative review process, the suspension remains in effect.

.02 If an Electronic Filer receives a suspension letter from a district office or a service center, the Electronic Filer is entitled to an appeal, in writing, to the Director of Practice.

.03 The Electronic Filer must ensure that the district office or service center that issued the suspension letter receives the Electronic Filer's written appeal for review by the Director of Practice within 30 calendar days of the date of the suspension letter. The Electronic Filer's written appeal for review must contain detailed reasons, with supporting documentation, for reversal of the suspension. In addition, the Electronic Filer must include a copy of its Form 8633 and a copy of the suspension letter.

.04 The district office or service center whose decision to suspend is being appealed will, upon receipt of a written appeal to the Director of Practice, forward to the Director of Practice its file on the Electronic Filer and the

material described in subsection .03 that the Electronic Filer has submitted to the district office or the service center. The district office or the service center will forward to the Director of Practice these materials within 15 calendar days of the receipt of an Electronic Filer's written request for appeal.

.05 Failure to appeal within the 30-day period described in subsection .03 irrevocably terminates an Electronic Filer's right to an appeal.

SEC. 19. EFFECTIVE DATE

This revenue procedure is effective September 20, 1994.

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